2004

Allen R. Ervin and Blanch Ervin v. Lowe's Companies, Inc. a North Carolina corporation: Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

ALLEN R. ERVIN and
BLANCHE ERVIN,
Plaintiffs,
vs.
LOWE'S COMPANIES, INC., a North Carolina corporation,
Defendant, and Appellant.

LOWE'S COMPANIES, INC., a North Carolina corporation,
Third Party Plaintiff and Appellant
vs.
COLLINS CO., LTD., a Taiwanese corporation, and
COLLINS INTERNATIONAL CO., LTD.,
A New Jersey corporation,
Third Party Defendants and Appellees.

Appellate Case No.
20040158-CA

BRIEF OF APPELLANT

APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY,
HONORABLE SANDRA N. PEULER
(ORAL ARGUMENT REQUESTED)

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JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction by order of the Utah Supreme Court transferring this case pursuant to U.C.A. 78-2-2(4), as amended. (R. 2186) The Utah Supreme Court had appellate in the first instance under U.C.A. 78-2-2 (3)(j), as amended.

ISSUES PRESENTED FOR REVIEW, STANDARD OF REVIEW, AND PRESERVATION FOR REVIEW

FIRST ISSUE FOR REVIEW. Whether the trial court substantially erred in entering its summary judgment dated June 18, 2003 dismissing with prejudice and as a matter of law the contract claims of Appellant Lowe's Companies, Inc., a North Carolina corporation ("Lowe's") against Appellee Collins International Co. Ltd., a New Jersey corporation ("Collins New Jersey") for breach of contract duties to provide liability insurance for Lowe's and to indemnify and defend Lowe's against liability to Plaintiffs related to the use of a defective product sold to Eagle Hardware & Garden, Inc., a Washington corporation ("Eagle") by the corporate parent of Collins New Jersey.

The standard of review for summary judgment is set forth in Wycalis v. Guardian Title of Utah, 780 P2d 821, 116 Utah Adv. Rep. 27, 1989 Utah App. LEXIS 145 (Utah Ct. App. 1989):

> "Appellate courts scrutinize summary judgments under the same standard applied by the trial courts, according no particular deference to the trial court's legal conclusions concerning whether the material facts are in

> dispute and, if they are not, what legal result obtains. [citations omitted]. We consider the evidence in the light most favorable to the losing party, and affirm only where it appears there is no genuine dispute as to any material issues of fact, or where, even according to the facts as contended by the losing party, the moving party is entitled to judgment as a matter of law." (780 P.2d at 824).

Lowe's preserved the first issue for appellate review by Lowe's September 6, 2002 memorandum with exhibits opposing the motion for summary judgment of Collins New Jersey (R. at 439-671), the exhibits attached to the memorandum (R. at 456-671), the Affidavit of John D. Davis and its exhibits (R. 358- 438), the Affidavit of Carol Lynn and its exhibits (R. at 314-47), and the Affidavit of Richard L. Noegel and its exhibits. (R. 539-59), and by the oral argument of Lowe's counsel at the hearing on September 20, 2002. (R. 2189, T. at 1- 19). Lowe's further preserved this issue for review by Lowe's May 23, 2003 motion for relief from summary judgment with supporting memorandum and evidence including the Affidavit of Walt Williams and its exhibits. (R. 1751- 1896).

SECOND ISSUE FOR REVIEW: Whether the trial court substantially erred in entering its order dated January 21, 2000 dismissing without prejudice Lowe's claims against Appellee Collins Co., Ltd., a Taiwanese corporation ("Collins Taiwan") for lack of personal jurisdiction on the grounds that Collins Taiwan did not have constitutionally sufficient minimum contacts

with Utah providing a basis for specific long arm jurisdiction under Utah's Long Arm statute.

The standard for review of dismissal for lack of personal jurisdiction is set forth in Phone Directories Co., Inc. v Henderson, 2000 UT 64, 8 P.3d 256, 402 Utah Adv. Rep. 7, 2000 Utah LEXIS 79 (Utah 2000): "P6 'Because the propriety of a 12(b)(2) dismissal is a question of law, we give the trial court's ruling no deference and review it under a correctness standard.' [citation omitted]. "(29 P.3d at 635-36) A plaintiff opposing to a motion to dismiss for lack of jurisdiction need only make a prima facie showing of personal jurisdiction. The trial court resolves all factual disputes in plaintiff's favor in determining whether the required showing has been made. System Designs, Inc. v. New Customware Company, Inc. 2003 US Dist LEXIS 3271, Case No. 2:01-CV-00770PGC (D. Utah 2003)

Lowe's preserved the second issue for review by Lowe's August 12, 2003 memorandum with exhibits opposing the motion to dismiss of Collins Taiwan (R. at 2015-2152), and by oral argument of Lowe's counsel at the hearing on October 27, 2003. (R. at 2190, T. at 1-23).

STATEMENT OF THE APPELLANT'S CASE

NATURE OF THE CASE. The Complaint of Plaintiffs Allen R. Ervin and his wife Blanche Ervin alleges that Mr. Ervin was injured on May 13,

1999 when a wheelbarrow tire and wheel assembly he was inflating exploded. (R. at 1-3). Mr. Ervin purchased the wheelbarrow on May 11, 1999 from Eagle. (R. 1917-18). Plaintiffs allege the wheelbarrow tire and metal wheel assembly were dangerously defective. In particular, a welding bead on the inside of the two-piece metal wheel was inadequate and caused the wheel to fail catastrophically during ordinary pressurization. (R. at 3-4). Mr. Ervin and his wife Plaintiff Blanche Ervin sued Lowe's as the successor of Eagle alleging for causes of action negligence, strict product liability, and breach of implied warranties of merchantability and fitness. (R. at 7-11). Lowe's asserted third party claims for allocation of fault and money damages against vendors Collins New Jersey (R. at 29-34) and Collins Taiwan (R. at 1678-83) alleging breach of express contractual duties. These duties were to provide products of suitable quality and fitness, to defend and indemnify Lowe's and related entities against claims by customers injured by defective products, and to provide liability insurance covering Lowe's and related entities.

COURSE OF THE PROCEEDINGS AND DISPOSITION BELOW. On January 2, 2002 Plaintiffs and tire manufacturer Shinfa stipulated and moved to dismiss with prejudice the Plaintiffs' claims against Shinfa. (R. at 82-85).On June 3, 2003, Plaintiffs and Lowe's settled, and stipulated and moved to dismiss with prejudice the Plaintiff's claims against

Lowe's based upon their written settlement agreement. (R. at 1962-73) Lowe's claims against Collins New Jersey were dismissed with prejudice on motion for summary judgment on June 19, 2003. (R. at 1980-82) The trial court's reasoning is set forth in the September 30, 2002 Minute Entry. (R. at 729-732, Addendum 38-41). Lowe's third party claims against Collins Taiwan were dismissed without prejudice on motion for lack of personal jurisdiction on January 21, 2004. (R. at 2178-2179). The trial court's reasoning is contained in the October 30, 2003 Minute Entry. (R. at 2168-71, Addendum 42-45). No trial occurred below. Plaintiffs and Shinfa are not parties to this appeal.

FACTS RELEVANT TO THE ISSUES PRESENTED. The first issue presented for review is the correctness of summary judgment dismissing Collins New Jersey, the following relevant facts were set forth in Lowe's memorandum in opposition to the motion for summary judgment of Collins New Jersey (R. at 439-55) and supported in part by admissible evidence contained in exhibits attached to the memorandum (R. at 456-671), the Affidavit of John D. Davis and its exhibits (R. 358- 438), the Affidavit of Carol Lynn and its exhibits (R. at 314-47), and the Affidavit of Richard L. Noegel and its exhibits. (R. 539-59).

Plaintiff Allen R. Ervin purchased the subject wheelbarrow on May 11, 1999, at the Eagle Hardware & Garden store located at 469 West 4500 South;

Murray, Utah and paid $29.98 before tax. (R. 444, 574-76). Plaintiffs' experts concluded that the wheelbarrow's tire and wheel assembly were defective and unable to withstand foreseeable inflation pressures and the tire and wheel exploded as Mr. Ervin was inflating the tire with pressurized air on May 13, 1999 due to defective construction. (R. at 1655-1661). Plaintiffs allege in substance the product defects to include a latent welding defect inside the steel wheel where the two halves of the rim were joined together which could not be ascertained by reasonable inspection, a steel wheel made of extremely thin metal with sharp edges. (R. at 444, 3-5,1655-1661). The wheel assembly of the subject wheelbarrow involved in Mr. Ervin's accident was manufactured in Taiwan. (R. at 314-23).

The vendor of the subject wheelbarrow was Collins Import; Formosa Plastics Bldg.; 6th Floor 201 Tung Hwa No. Road, Taipei, Taiwan, Eagle's vendor number 3191. (R. 445-446, 539-559, 457-46). Collins New Jersey holds itself out to interested parties throughout the world on the internet at its website www.collinsinternational.com as follows:

> "Collins International Co. Ltd. was founded in 1990 and is a division of Collins Group (a public company in Taiwan), this company handles all U.S.A. & Canada markets. It provides customers with sourcing of parts & finished products from reliable factories in Asia.
>
> Collins Co. Ltd. is a multi-national, decently diversified, and stocked listed corporation. Based in

> Taipei, Taiwan and founded in 1969, the corporation has well expended its business sales finance..." (R. at 446-447, 662-63)

Collins Taiwan holds itself out to interested parties throughout the world on the internet at its website www.Collins.com.tw and describes itself and related entities in part as follows:

> "Location of Collins Co., Ltd. Formosa Plastic Bldg., 6th Floor 201-1; Tung-Hwa North Road; Taipei, Taiwan...Authoriged [sic] Capited [sic] NT$4.9 billion...Number of employees: 523 (as of Jay [sic] 1, 2001)" (R. at 446-47, 665-669).

Collins Taiwan describes its overseas business group at its web site to include in part:

> "Collins International Co., Ltd.; New Jersey Office: 21-00 Route 208 Fair Lawn, NJ 07410, U.S.A....N. Carolina Office: 1605 Industrial Drive; Wilkesboro, NC 28697, U.S.A. ..."
> (R. at 666-67).

Collins Taiwan describes on its website the capabilities of the Collins Group to include:

> "...Update [sic] product and market information...
> Wide Range of High-Quality Product Selection...
> Developed sourcing ability around Asia..." (R. at 446, 668-69).

In July 2000, representatives of Eagle and Lowe's H I W, Inc., a Virginia Corporation signed Articles and Plan of Merger. Articles of merger

were filed with the Washington Secretary of State on July 27, 2000 merging Lowe's H I W, Inc. into Eagle Hardware and Garden, Inc. in accordance with the State of Washington Business Corporation Act. Lowe's HIW, Inc. by name change was the surviving entity. (R. 445, 585-586, 619-629, 1762).

As set forth in the May 23, 2003 Affidavit of Walter Williams and its exhibits, Eagle was a wholly owned subsidiary of Lowe's at the time Plaintiffs' cause of action arose on May 13, 1999. (R. at 1754-1759)[1].

Lowe's and Collins New Jersey entered Lowe's Master Standard Buying Agreement dated October 30, 1996, signed by A.G. Church as account executive for Collins New Jersey. (R. at 520-37, Addendum 46-63). Under the Agreement:

a. The parties understood that Lowe's operated stores for the sale of goods and that Collins New Jersey was a vendor of products (R. at 520);

b. The parties expressly agreed that Lowe's would not be liable for inspection of merchandise before resale and that all warranties express or implied would survive inspection, acceptance, and payment by Lowe's and Lowe's customers (R. at 527);

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[1] The Walter Williams Affidavit is discussed in Lowe's May 23, 2004 motion and memorandum for relief from and to amend the factual findings supporting the June 19, 2003 summary judgment in favor of Collins New Jersey. The Affidavit and its exhibits discuss in greater detail transactions related to Eagle's becoming a wholly owned subsidiary of Lowe's.

c. Collins New Jersey warranted that merchandise "...will be of good quality, material and workmanship, merchantable, and free from any and all defects." (R. at 527);

d. Collins New Jersey expressly agreed "(5)...in consideration of any and all purchases made heretofore, herein, and hereafter, made by Lowe's from Vendor or from affiliates or subsidiaries of Vendor, and by accepting the Order, vendor agrees to and shall indemnify LOWE'S, "LOWE'S" means collectively Lowe's Companies, Inc., its subsidiaries and affiliate, including but not limited to ...from and against and all liability and/ or losses against LOWE'S as is further set forth below. Vendor's obligation to indemnify and hold harmless LOWE'S shall include, but not be limited to, any and all claims, lawsuits, appeals, actions, assessments, product recalls, decrees, judgments, orders, investigations, civil penalties or demands of any kind, including court costs, expenses and attorney's fees, which may be made or brought against LOWE'S or third parties of said merchandise; any allegation of or actual misrepresentation or breach of warranty, expressed or implied, in fact or by law, with respect to the possession, purchase or use of said merchandise; any alleged bodily injury or property damage related to the possession or use of said merchandise...Vendor shall pay all judgments against and assume the defense within a reasonable time for any and all liability of LOWE'S with respect to any such matters, even if any such allegation of liability is groundless, false, or fraudulent. Notwithstanding the above, LOWE'S shall have the right but not the obligation to participate in the handling adjustment or defense of any such matter... Should Vendor fail to assume its obligations hereunder, to diligently pursue and pay for the defense of Lowe's within a reasonable time, Vendor hereby agrees that LOWE'S shall have the right, but not the obligation, to proceed on Lowe's own behalf to defend itself by way of engaging its own legal counsel and the services of any and all other experts or professionals it deems necessary to prepare and present a proper defense, and thereafter require from Vendor reimbursement and indemnification for all costs and expenses incurred in such defense and for any and all penalties, judgments, fines, interest or other expenses..."(R. at 528-29, Addendum 54-55).

e. Collins New Jersey further agreed: "During the term of this Agreement and for a period of five (5) years after the date of termination, Vendor shall procure and maintain Products Liability and Completed Operations Liability Insurance on an occurrence basis with limits of not less that $ 2,000,000 per occurrence and an annual aggregate of not less than $10,000,000 for property damage, bodily injury, or death..." (R. at 529-30, Addendum 55-56).

f. Collins New Jersey and Lowe's expressly agreed that except for the duty to provide insurance discussed above the term of the Agreement was for one year from date of execution and year to year thereafter unless terminated by written notice by either party not later than 60 days prior to the end of the term. (R. at 536). The agreement was not terminated and was in force at all material times after its execution.

The second issue presented for review goes to the correctness of the order dismissing Collins Taiwan for lack of personal jurisdiction.

Collins Taiwan, shown on Eagle's records as "Collins Import," for itself and for the Collins Group of companies, advertised, marketed, solicited customers, entered contracts, sold goods, and conducted other substantial business in the United States and did so with the knowledge, purpose, or expectation that its activities and products would reach various states including Utah. (R. at 2016-17, 2077-79). More specifically, Collins Taiwan:

(a) advertised, marketed, solicited customers, and engaged in other commercial activity on the worldwide internet and continues to do so. (R. at 2017);

(b) attended trade shows in the United States to solicit orders. Eagle's lawn and garden department buyer Rick Noegel dealt with representatives of both Collins Taiwan and Collins New Jersey at trade shows in the United States. Based on his interactions with Jackson Chen of Collins New Jersey, Danny Wang of Collins Taiwan, and their whole entourage, Mr. Noegel formed the belief that there was but a single Collins business entity and that its representatives worked for Danny Wang who was Mr. Noegel's primary business contact. (R. at 2021, 2038-39, 2078, 2085-86);

(c) sold a substantial amount of product to Eagle since 1990 as one of Eagle's first vendors with whom Eagle started doing business in 1990. The volume of product may be demonstrated by reference to Eagle's 100,000 square foot store carrying 60,000 stock keeping units. (R. at 2017);

(d) maintained a strong and ongoing business relationship with Eagle as a supplier of goods. Eagle's then lawn and garden buyer Rick Noegel purchased goods for Eagle from Collins Co., Ltd.'s representative Danny Wang with whom Mr. Noegel had dealt sine 1989 or 1990. (R. at 2017);

(e) conducted operations in the United States through its wholly owned subsidiary, Collins International Co., Ltd. (R. at 2017);

(f) filled a purchase order faxed to Collins Co., Ltd. in Taiwan by Rick Noegel of Eagle. Collins Taiwan in 1997 and sold the subject wheelbarrow to Eagle as part of a shipment of wheelbarrows shipped from Taiwan to Eagle's Warehouse in Auburn, Washington. Collins Co., Ltd. sold wheelbarrows to Eagle on an ongoing basis by filling replenishment orders. (R. at 2016-20).

Rick Noegel was the buyer for Eagle's lawn and garden department, and solely responsible for purchasing products in this department for all Eagle's stores in Utah and across the country. The understanding and agreement throughout course of dealing between Eagle and Collins Taiwan was that Collins would insure that wheelbarrows sold to Eagle from Taiwan conformed to Eagle's specifications and were of suitable quality. Eagle relied on Collins for this quality control and did not independently test the quality of wheelbarrows. This evidence demonstrates that Collins Taiwan fully understood and expected that goods sold to Eagle would be held out for retail sale to the public at Eagle's stores throughout the U.S.A. including Utah. (R. at 2018).

Collins Taiwan and Lowe's subsidiary L. G. Sourcing, Inc. ("LGS") entered the LGS Standard Buying Agreement dated September 26, 2000. (R. at

2100-27, addendum 64-91). The Agreement provides in part that Collins Co., Ltd. is a manufacturer of products selling products to LGS for eventual retail sale in the United States and Canada (R. at 2100, 2117); shall ship and carton products in the described manner (R. at 2103); shall place markings on products to identify date of manufacture (R. at 2105); understands that LGS shall not be responsible for inspecting products before retail (R. at 2109); warrants that products are of good quality and merchantable and free from all defects guarantees that products comply with buyer's specifications (R. at 2110); that the products comply with all laws of the United States pertaining to public safety and health including the Consumer Product Safety Act (R. at 2111-12); shall comply with the Code of Business Ethics of LGS and/ or its parent Lowe's (R. at 2115-16); shall defend and indemnify LGS and its affiliates against liability and pay their costs and fees in defending product liability suits for personal injuries "...in consideration of any and all purchases heretofore, herein, and hereafter made by LGS..." (R. at 2113-15); agrees that the rights and remedies provided in the Agreement are in addition to and not to the exclusion of other rights and remedies provided by law (R. at 2120); and submits to the jurisdiction of the federal and state courts of North Carolina. (R. at 2121).

Collins Taiwan understood and expected that goods sold to Eagle would be held out for retail sale to the public at Eagle's stores throughout the U.S.A.

including Utah as shown by the following facts. Eagle's then lawn and garden buyer Rick Noegel purchased goods for Eagle from Collins Taiwan's representative Danny Wang with whom Mr. Noegel had dealt sine 1989 or 1990. (R. at 2020). Eagle's buyer Rick Noegel was solely responsible for purchasing lawn and garden products for all Eagle's stores in Utah and across the country. (R. at 2020). Mr. Noegel traveled to Taiwan and elsewhere in Asia where he made deals, and formed ongoing business relationships including his long term business relationship with Danny Wang of Collins Taiwan. (R. at 2020). The understanding and course of dealing between Eagle and Collins Taiwan was that Collins would perform tests and inspections to insure the quality of the wheelbarrows sold to Eagle from Taiwan and conformance to Eagle's specifications. Eagle relied on Collins for this quality control and did not independently test the quality of wheelbarrows. (R. at 2020). Purchase orders for merchandise including the subject wheelbarrow were directed by Eagle to Collins Taiwan. (R. at 2020-21).

Lowe's product liability insurer, Reliance Insurance Company, entered liquidation while this case was pending.(R. at 2022). Collins New Jersey furnished to Lowe's certificates of insurance as required by their Agreement representing that occurrence based general liability insurance through Lexington Insurance Company covered Collins International Co., Ltd. and

Collins Company, Ltd. and its subsidiaries, and also covered the certificate holder Lowe's Companies, Inc. and its subsidiaries for the one year policy period beginning July 22, 1998 including the date of Mr. Ervin's accident. (R. at 2022, 2150-52). On or about May 19, 2003, Lowe's notified the liability insurer of Collins Taiwan of mediation on June 2, 2003 to settle Plaintiffs' claims, demanded coverage, indemnification, and payment of attorney's fees. (R. at 2022, 2148-49). The Collins companies and Lexington Insurance failed to participate in mediation or contribute towards settlement or attorney's. Lowe's unilaterally negotiated and entered a compromise settlement of Plaintiffs' claims at mediation on June 2, 2003. (R. at 2022, 1962-1969)

SUMMARY OF ARGUMENTS

First, the 1996 Agreement between Lowe's and Collins New Jersey required Collins New Jersey to indemnify and defend Lowe's against products liability and implied warranty claims brought by Lowe's customers and also required Collins New Jersey to provide liability insurance covering Lowe's against such liability. Where Collins parent corporation Collins Taiwan sold the subject defective wheelbarrow to Eagle, and where Eagle later merged into Lowe's, the broad language of the agreement covered affiliates and subsidiaries of both the contracting parties thereby creating a cause of action by Lowe's

against Collins New Jersey which the trial court wrongfully dismissed on summary judgment.

Second, the 2000 Agreement between Collins Taiwan and Lowe's subsidiary LGS required Collins Taiwan to inspect products sold to LGS and warrant their fitness and quality and to indemnify and defend LGS and provide liability insurance for its benefit. Under the broad language of the Agreement, these duties ran to LGS affiliates including its parent Lowe's. Collins Taiwan sold substantial product to LGS as a known national retailer and Collins expected or intended distribution by Lowe's throughout the United States. The form selection clause in the contract identified North Carolina, not the state in which suit was brought by Plaintiff but evidence of Collins' expectation that it would be hailed into court somewhere in the United States. The requirements of due process are met and the trial court wrongfully dismissed Collins Taiwan for lack of personal jurisdiction.

ARGUMENT

POINT ONE: Collins New Jersey's 1996 agreement to indemnify and provide liability insurance covering Lowe's or its subsidiaries applies to Lowe's liability for the defective wheelbarrow sold by Eagle prior to merger.

Pivotal to the award of summary judgment to Collins New Jersey was the legal conclusion that Collins' duties under the 1996 agreement to indemnify

and provide insurance to Lowe's did not run to Eagle or to Lowe's for claims arising from goods sold to Eagle prior to the merger. (R. at 730).

The approach to construing such an agreement is discussed in Freund v Utah Power & Light Company, 793 P.2d 362, 134 Utah Adv. Rep. 7, 1990 Utah LEXIS 36 (Utah 1990). There, the Tenth Circuit Court of Appeals certified to the Utah Supreme Court a series of questions to be decided according to Utah law. Among the questions was whether the same rule of strict construction which applies to construing an agreement requiring another to indemnify against one's own negligence applies to an agreement by another to provide liability insurance covering such negligence? The Utah Supreme Court wrote:

> "However, when, as in the instant case, the parties have chosen by clear and unequivocal language to require one party to indemnify the other from liability arising from any cause including the indemnitee's own negligence, a further provision in that agreement to fund that indemnification by purchasing insurance should be construed as any other contractual language. See Larrabee v. Royal Dairy Prods. Co., 614 P.2d 160, 163 (Utah 1980) (first source of inquiry is within the document itself; it should be interpreted in its entirety and in accordance with its purpose; all of its parts should be given effect insofar as is possible); Atlas Corp. v. Clovis Nat'l Bank, 737 P.2d 225, 229 (Utah 1987) (in construing contracts, the court must give effect to the parties' intentions. If possible, those intentions must be determined from an examination of the text of the agreement). A heightened rule of construction is not warranted. See Pickhover v. Smith's Management Corp., 771 P.2d at 667-68, and cases cited therein." (793 P.2d at 372-73)

Russ v Woodside Homes, 905 P.2d 901, 905-905 (Utah Ct. App. 1995) discussed that the validity of indemnification provisions requires a clear and

unequivocal expression of the parties' intent and also observed a rend relaxing the rule of strict construction:

> ". . .Second, parties may contract to shift potential liability from one party to another. Such indemnity provisions are designed to allocate fairly the risk of loss or injury resulting from a particular venture between the parties. Utah courts have held that indemnity agreements, like releases, are valid only if the contract language clearly and unequivocally expresses the parties' intent to indemnify one another. See, e.g., Freund v. Utah Power & Light Co., 793 P.2d 362, 371-72 (Utah 1990) (upholding indemnity provision whose language clearly and unequivocally expressed licensee's intent to indemnify licensor). Historically, Utah courts applied a strict construction rule for indemnity provisions. See Shell Oil Co. v. Brinkerhoff-Signal Drilling Co., 658 P.2d 1187, 1189 (Utah 1983); Union Pac. R.R. v. Intermountain Farmers Ass'n, 568 P.2d 724, 725-26 (Utah 1977); Howe Rents Corp. v. Worthen, 18 Utah 2d 263, 265, 420 P.2d 848, 849 (1966); Union Pac. R.R. v. El Paso Natural Gas Co., 17 Utah 2d 255, 260, 408 P.2d 910, 913-14 (1965); Jankele v. Texas Co., 88 Utah 325, 329-30, 54 P.2d 425, 427 (1936). However, the Utah Supreme Court has relaxed the rule of strict construction and adopted a more lenient clear and unequivocal test for enforcing indemnity agreements. Freund, 793 P.2d at 370-71; see also Pickhover v. Smith's Management Corp., 771 P.2d 664, 667-68 (Utah App. 1989) (discussing trend to limit rule of strict construction for indemnity agreements), cert. denied, 795 P.2d 1138 (Utah 1990)."

In Bishop v Gentec, Inc., 2002 UT 36, 444 Utah Adv. Rep. 10 (Utah 2002), Plaintiffs' decedent was inspecting and attempting to repair one of his employer's asphalt silos. He was crushed between the doors of the silo when they suddenly closed. Plaintiffs sued the silo component manufacturer in strict

product liability. The manufacturer then brought a third party complaint against the employer for indemnification based on language on the reverse side of the pre-printed form invoice for the sale of the components which read:

> "{20}...'INDEMNIFICATION
> Customer shall indemnify and hold GenTec harmless from all expenses (including attorney's fees), claims, demands, suits, judgments, actions, costs, and liabilities (including without limitation those alleging GenTec's own negligence) which arise from, relate to or are connected with the Customer's negligent possession, use, operation or resale of the equipment and other goods described herein or any manuals, instructions, drawings or specifications related thereto...'"

The trial court granted summary judgment requiring the employer to indemnify the manufacturer. The Utah Supreme Court reversed, writing:

> "We have previously stated that "[on] grounds of public policy, parties to a contract may not generally exempt a seller of a product from strict tort liability for physical harm to a user or consumer unless the exemption term 'is fairly bargained for and is consistent with the policy underlying that [strict tort] liability.'" Interwest Constr. v. Palmer, 923 P.2d 1350, 1356 (Utah 1996) (quoting Restatement (Second) of Contracts § 195(3) (1981)). Comment (c) to the Restatement (Second) of Contracts, section 195, indicates that agreements exempting a seller from strict products liability are unenforceable.[footnote omitted].
> {19} In the context of negligence, we have consistently held that an "indemnity agreement which purports to make a party respond for the negligence of another should be strictly construed." Freund v. Utah Power & Light Co., 793 P.2d 362, 370 (1990). In construing such agreements, we have looked at the "objectives of the parties and the surrounding facts and circumstances" in interpreting the contractual language. Id. "In general, the common law disfavors agreements that indemnify parties against their own negligence because 'one might be careless of another's life and limb, if there is no penalty for carelessness.'" Hawkins v. Peart, 2001 UT 94, P 14, 37 P.3d 1062 (citing Hyde v. Chevron U.S.A., 697 F.2d 614, 632 (5th Cir. 1983)). Parties seeking to exempt themselves from tort liability must "'clearly and unequivocally' express an intent to limit

tort liability" within the contract. See Interwest, 923 P.2d at 1356 (quoting DCR, Inc. v. Peak Alarm Co., 663 P.2d 433, 438 (Utah 1983)). "Without such an expression of intent, 'the presumption is against any such intention, and it is not achieved by inference or implication from general language . . . .'" Id. (citation omitted). Furthermore, we will not infer an intention to indemnify against other kinds of liability, including strict liability, where such intention is not clearly expressed."

Ringwood v Foreign Auto Works, 786 P.2d 1350,125 Utah Adv. Rep. 45,1990 Utah App. LEXIS 41 (Utah Ct. App. 1990) gave the required elements of an enforceable third-party beneficiary agreement: "'Generally, the rights of a third-party beneficiary are determined by the intentions of the parties to the subject contract.' [citation omitted] Moreover, 'for a third-party beneficiary to have a right to enforce a right, the intention of the contracting parties to confer a separate and distinct benefit upon the third party must be clear.'" (786 P.2d at 1355).

Concerning the liability of successor corporations, the State of Washington Business Corporation Act governs the merger of Eagle into Lowe's H I W, Inc. R.C.W. 23B.11.060, 1989 as amended, provides in part:

"(1) When a merger takes effect:

(a) Every other corporation party to the merger merges into the surviving corporation and the separate existence of every corporation except the surviving corporation ceases;

(b) The title to all real estate and other property owned by each corporation party to the merger is vested in the surviving corporation without reversion or impairment;

(c) The surviving corporation has all liabilities of each corporation party to the merger..."

R.C.W. 23B.06.220, 1989 as amended provides:

> " A purchaser from a corporation of its own shares is not liable to the corporation or its creditors with respect to the shares except to pay the consideration for which the shares were authorized to be issued under RCW 23B.06.210 or specified in the subscription agreement under RCW 23B.06.200"

This is consistent with the general rule in Utah. "Under the doctrine of corporate successor liability, changes in ownership of a corporation's stock does not affect the corporation's liabilities. Smith Land, 851 F.2d at 91. In the case of a merger, the remaining corporation may likewise be held liable for the acts of the dissolved corporation. Id. Ekotek v. Self, 948 F Supp 994,1000, 1996 US Dist LEXIS 18362, 27 ELR 20659 (D. Utah 1996).

Repeating the pertinent contract language from above: "(5)...in consideration of any and all purchases made heretofore, herein, and hereafter, made by Lowe's from Vendor or from affiliates or subsidiaries of Vendor, and by accepting the Order, vendor agrees to and shall indemnify LOWE'S, "LOWE'S" means collectively Lowe's Companies, Inc., its subsidiaries and affiliates..."(R. at 528).

Bringing the above authorities to bear on the trial court's decision, the sale and shipment of the subject defective wheelbarrow occurred during the effective period of the agreement, from Collins Taiwan as vendor and the parent corporation of Collins New Jersey, to Eagle, which became an affiliate of

Lowe's by merger and which passed the subject wheelbarrow liability to Lowe's by operation of Washington statute. The subject matter of the 1996 agreement was an ongoing commercial relationship between Lowe's and Collins New Jersey spanning years, not a job- to- job relationship of the sort in Gentec, Inc., supra. Insofar as Lowe's relationship with Collins New Jersey involved purchasing from markets in Taiwan, Lowe's requirement of assistance from its vendor in guarding against defective products where Lowe's lacked the capability to police product quality was fair and reasonable. The need for the vendor's assistance in quality assurance is particularly acute here where the defect is a hidden manufacturing defect which Eagle and Lowe's could not reasonably be expected to discovery. Collins New Jersey had the benefit of assistance from its parent corporation headquartered in Taiwan in screening manufacturers and looking after product quality. So, Collins New Jersey's taking on the risk of indemnification was fair and reasonable. That Eagle is not specifically named in the contract does not obscure the clear intention of the parties. Although Eagle's liability would be covered by the contract's reference to affiliates and subsidiaries, the Plaintiff here did not sue Eagle and Eagle is not attempting to assert rights. The contract language survives strict construction to support the contract duty of Collins New Jersey to indemnify Lowe's.

Moreover, the relationship and objectives of the parties make this construction fair and reasonable.

The duty of Collins New Jersey to provide product liability insurance covering Lowe's and related entities compliments the duty to indemnify. As Lowe's relied on its vendor to police for product quality in Taiwan, Lowe's also relied on its vendor for product liability insurance covering Lowe's and its corporate relatives during the contract period and for five years thereafter. This portion of the duties of Collins New Jersey to be financially responsible for defective products shipped from Taiwan can be viewed from Collins' point of view as a method to fund contingent liability where a retail customer is injured by a defective product. However, the duty to provide insurance is separate and distinct from the duty to indemnify so that if that latter is unenforceable Lowe's would have the benefit of the former. Where that benefit is not available, the Collins New Jersey should be required to respond in damages.

In partial conclusion, the 1996 agreement imposes enforceable obligations upon Collins New Jersey to defend and indemnify and to insure Lowe's against liability for Plaintiff injuries.

POINT TWO: Collins Taiwan is susceptible to the specific long arm jurisdiction of Utah state courts.

The possible bases for obtaining long-arm jurisdiction over Collins Taiwan are contained in U.C.A. 78-27-24, as amended, which says in part:

"Any person, notwithstanding Section 16-10a-1501, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising out of or related to:
(1) the transaction of any business within this state;
(2) contracting to supply services or goods in this state;
(3) the causing of any injury within this state whether tortious or by breach of warranty;
(4) the ownership, use, or possession of any real estate situated in this state;
(5) contracting to insure any person, property, or risk located within this state at the time of contracting;..."

The exercise of long arm jurisdiction as provided by statute must be comport with due process. In State of Utah in re W.A., v. State of Utah, , 2002 UT 127, 463 Utah Adv. Rep. 13, 2002 Utah LEXIS 214 (Utah 2002) the Utah Supreme Court articulated the test for personal jurisdiction over a non-resident:

"P14 We now clarify the law regarding this issue. The proper test to be applied in determining whether personal jurisdiction exists over a nonresident defendant involves two considerations. First, the court must assess whether Utah law confers personal jurisdiction over the nonresident defendant. This means that a court may rely on any Utah statute affording it personal jurisdiction, not just Utah's long-arm statute. Second, assuming Utah law confers personal jurisdiction over the nonresident defendant, the court must assess whether an assertion of jurisdiction comports with the due process requirements of the Fourteenth Amendment..."

In Parry v Ernst Home Center Corporation, 779 P.2d 659, 114 Utah Adv. Rep. 19, 1989 Utah Lexis 83 (Utah 1989) the Utah Supreme Court affirmed the

lower court's dismissal for lack of personal jurisdiction in a products liability case involving an overseas defendant under the following facts:

> "In January 1980, plaintiff was injured in Utah while splitting logs with a WECO maul which had been manufactured by Hirota Tekko K.K., a Japanese manufacturer. Hirota had sold the maul to Okada Hardware in Japan for export to the United States. Okada exported it to Mansour, a California corporation, who then sold it to Pacific Marine Schwabacher, its regional distributor. Schwabacher distributed and sold the mauls to retailers throughout the west coast and mountain area, including defendants Ernst Home Center Corporation and Pay N' Save. The Ernst Home Center in Twin Falls, Idaho, sold this particular maul to Linda Thayne in December, 1979. She then gave the maul to her father in Utah. Plaintiff borrowed it from him and was injured while using it." (id. at 660)

The requirements of due process were discussed:

> "Due process requires that before a court can exercise specific personal jurisdiction over a nonresident defendant, the defendant must have had 'minimum contacts with the forum state such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."' Synergetics, 701 P.2d at 1110; International Shoe Co. v. Synergetics, 701 P.2d at 1110; International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95, 102 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463, 61 S. Ct. 339, 342, 85 L. Ed. 278, 283 (1940)). Further, the defendants' 'conduct and connection with the forum state [must be] such that [they] should reasonably anticipate being haled into court there.'World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S. Ct. 559, 567, 62 L. Ed. 2d 490, 501 (1980). The Court will examine whether the defendant corporation has 'purposefully availed' itself of the privilege of conducting activities within the forum state. Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240, 2 L. Ed. 2d 1283, 1298 (1958). This Court has recognized that 'the central concern of the inquiry into personal jurisdiction is the relationship of the defendant, the forum, and the litigation to each other.' Synergetics, 701 P.2d at 1110; Mallory Engineering v. Ted R. Brown & Assocs., 618 P.2d 1004, 1007 (Utah 1980) (footnote omitted), cert. denied, 449 U.S. 1029, 101 S. Ct. 602, 66 L. Ed. 2d 492 (1980). The courts must also examine

' "whether the cause of action arises out of or has a substantial connection with the activity; and . . . . [whether there was a] balancing of the convenience of the parties and the interests of the State in assuming jurisdiction.'" Synergetics, 701 P.2d at 1110 (quoting Mallory Engineering v. Ted R. Brown & Assocs., 618 P.2d at 1008. The United States Supreme Court stated that additional factors for inquiry include
the burden on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining relief. It must also 'weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies." Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 113, 107 S. Ct. 1026, 1034, 94 L. Ed. 2d 92, 105 (1987) (quoting World-Wide Volkswagen, 444 U.S. at 292, 100 S. Ct. at 564, 62 L. Ed. 2d at 498); see also Strachan, In Personam Jurisdiction In Utah, 1977 Utah L. Rev. 235, 241.
The law on personal jurisdiction is less than clear, and we confront now the law as it applies in the international context. At present, the due process approach taken by most courts in this country overlooks important differences between assertions of jurisdiction in the interstate context and those in the international context. See Born, Reflections on Judicial Jurisdiction in International Cases, 17 Ga. J. Int'l & Comp. L. 1 (1987). The United States Supreme Court's most recent decision, Asahi Metal Industry Co., makes note of the inconvenience placed upon international defendants when balanced against the forum state's interest in litigating the plaintiff's claims: 'The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.' Asahi, 480 U.S. at 114, 107 S. Ct. at 1034, 94 L. Ed. 2d at 105. Nevertheless, Asahi seems to add little clarity to the already murky waters. On the subject of contacts as a whole, the pertinent cases have produced a considerable variance in results.1 Indeed, just where the line of limitation falls on the power of state courts to enter binding judgments against persons not served with process within their boundaries has been the subject of prolific controversy, particularly with regard to foreign corporations.'" (id. at 662-663)

The Court observed the results of a number of federal cases decided

after Asahi:

" See also the following federal district court cases decided since Asahi: Warren v. Honda Motor Co., 669 F. Supp. 365, 370 (D. Utah 1987) (Honda Motors' purposeful acts of placing its all-terrain cycle ("ATC") into a worldwide market, including the United States and Utah, was attributed to its subsidiary corporation and designer, Honda R & D, which designed its cycle for a particular, related manufacturer and known distributors. It deliberately designed the product for a worldwide market, including Utah); Wessinger v. Vetter Corp., 685 F. Supp. 769, 777 (D. Kan. 1987) (personal jurisdiction was proper over Japanese corporations Honda and Honda R & D because an American subsidiary, American Honda, distributed their motorcycles in Kansas); John Scott, Inc. v. Munford, Inc., 670 F. Supp. 344, 345-46 (S.D. Fla. 1987) {779 P.2d 666} (personal jurisdiction was proper over Philippine manufacturer in Florida due to the agency relationship between the Florida furniture seller and the manufacturer); Hall v. Zambelli, 669 F. Supp. 753, 757 (S.D. W. Va. 1987) (personal jurisdiction was proper over Japanese manufacturer of fireworks who sold directly to a Pennsylvania corporation which used the product in West Virginia); Dittman v. Code-A-Phone Corp., 666 F. Supp. 1269, 1273 (N.D. Ind. 1987) (personal jurisdiction was proper over Japanese manufacturer of cordless phone which injured Indiana plaintiff; in addition to the parent-subsidiary relationship, officers of Uniden of Japan (parent) spent considerable time in Indiana and Uniden of America (subsidiary) was headquartered in Indiana); A.I.M. Int'l, Inc. v. Battenfeld Extrusions Systems, Inc., 116 F.R.D. 633, 640 (M.D. Ga. 1987) (personal jurisdiction over German corporate defendant was proper where defendant contracted with Georgia residents to sell products in Georgia, met there to negotiate the contract, and breach of contract claim arose there); Ag-Chem Equipment Co. v. Avco Corp., 666 F. Supp. 1010, 1016 (W.D. Mich. 1987) (personal jurisdiction was proper over Italian manufacturer of industrial diesel engines where manufacturer and American representative knew that engines would be marketed by Michigan subdistributor and where manufacturer agreed to warrant its agreement to end-users). In all of these cases, the courts applied the Asahi analyses and noted that minimum contacts existed based on the 'additional conduct' of the foreign defendants. In those cases where there was a parent-subsidiary relationship, the courts readily found personal jurisdiction to be proper..." (id. at 665-666).

The enforceability and effect of forum selection provisions in contracts was reviewed in Phone Directories Co., Inc. v Henderson, 2000 UT 64; 8 P.3d 256; 402 Utah Adv. Rep. 7; 2000 Utah LEXIS 792000 Utah LEXIS 79 (Utah 2000) where the Utah Supreme Court reversed the trial court's dismissal on jurisdictional grounds in a contract action. The trial court did not decide whether the forum selection clause in the parties' agreement conferred jurisdiction. The Utah Supreme Court discussed the clause as follows:

> "While the trial court raised the question of whether a forum selection/consent-to-jurisdiction clause, by itself, could confer personal jurisdiction over a defendant, it did not answer this question, instead analyzing the personal jurisdiction question under the traditional inquiry.
> P14 Although use of the Harnischfeger three-part inquiry to determine personal jurisdiction is generally appropriate, we conclude that a different inquiry should be made in cases involving contractual forum selection/consent-to-jurisdiction clauses.[footnote omitted] In particular, we hold that, while a forum selection/consent-to-jurisdiction clause by itself is not sufficient to confer personal jurisdiction over a defendant as a matter of law, such clauses do create a presumption in favor of jurisdiction and will be upheld as fair and reasonable so long as there is a rational nexus between the forum selected and/or consented to, and either the parties to the contract or the transactions that are the subject matter of the contract. Although the rational nexus element does require some connection between Utah and either the parties to or the actions contemplated by the contract, it need not rise to the level required under section 78-27-24.
> P15 This partial departure from the traditional three-part inquiry when the parties have contractually selected or consented to a forum has two bases. First, people are free to waive the requirement that a court must have personal jurisdiction over them before that court can adjudicate a case involving them. See, e.g., National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315-16, 11 L. Ed. 2d 354, 84 S. Ct. 411 (1964) (stating that "it is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court"); Petrowski v. Hawkeye-Sec. Ins. Co.,

> 350 U.S. 495, 495-96, 100 L. Ed. 639, 76 S. Ct. 490 (1956) (holding that parties who stipulated to personal jurisdiction waived any right to assert a lack of personal jurisdiction); Curtis v. Curtis, 789 P.2d 717, 726 (Utah Ct. App. 1990) (stating that "defects in personal jurisdiction can be waived") (citing 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (1969)). Second, people are generally free to bind themselves pursuant to any contract, barring such things as illegality of subject matter or legal incapacity. See, e.g., Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353, 356, 75 L. Ed. 1112, 51 S. Ct. 476 (1931) ("The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts."); Frailey v. McGarry, 116 Utah 504, 211 P.2d 840, 847 (Utah 1949) (stating that "the law favors the right of men of full age and competent understanding to contract freely"). When combined, these two concepts support the conclusion that people can contractually agree to submit to the jurisdiction of a particular court, even if that court might not have independent personal jurisdiction over them under the Harnischfeger three-part inquiry.9 The potential risks of expanded jurisdiction--particularly the waste of judicial resources--are addressed by the requirement of a rational nexus between this state and either the parties to or the subject matter of the contract. Moreover, as we stated in Prows, the traditional defenses allowing one to avoid an unfair or unreasonable contract, such as duress and fraud, are available to parties litigating the validity of a forum. See Prows, 868 P.2d at 812 n.5. P16 Applying this standard to the present case, we conclude that the forum selection/consent-to-jurisdiction clause in the parties' contract, specifying Utah as the appropriate jurisdiction to resolve claims under the contract, creates a rebuttable presumption that the trial court has personal jurisdiction over Henderson." (8 P.3d 361-62)

When a plaintiff makes a prima facie showing that the defendants have sufficient contacts with Utah and this litigation for assertion of personal jurisdiction consistent with due process, then requiring the defendants to subject themselves to trial in a Utah court for the purpose of determining whether the plaintiff could prove jurisdiction was proper. Anderson v. American Soc'y of

Plastic & Reconstructive Surgeons, 807 P.2d 825 (Utah 1990), cert. denied, 502 U.S. 900, 112 S. Ct. 276, 116 L. Ed. 2d 228 (1991), cert. denied, 502 U.S. 900, 112 S. Ct. 276, 116 L. Ed. 2d 228 (1991).

The products sold by Collins Taiwan included wheelbarrows and other household items to national retail chains, making it foreseeable that products would reach consumers throughout the United States. The products involved are fungible, suitable to use throughout the world including Utah. The inconvenience to Collins Taiwan of defending a breach of warranty suit in Utah may best be assessed by focusing on Collins Taiwan as a non-resident corporation headquartered in Taiwan. Collins Taiwan is the parent company of an international group of corporations with a subsidiary corporation headquartered in New Jersey. Both Collins Taiwan and its subsidiary Collins New Jersey had contractual relations with Lowe's or its subsidiaries affecting Lowe's stores in Utah and across the United States. Collins Taiwan agreed to be called into the courts of North Carolina which poses no greater inconvenience in time or travel than being called into court in Salt Lake City, Utah. Collins expected and intended that litigation with Lowe's arising sales to Lowe's or its subsidiaries from would occur somewhere in the United States. Plaintiffs commenced the subject action in Utah. Lowe's joinder of Collins Taiwan and New Jersey to request allocation of fault as well as contract

damages in this pending action was necessary, appropriate, and in furtherance of conserving judicial resources. Utah has an interest in preserving and protecting the ability of the Utah Property and Casualty Insurance Guaranty Association ("UPCIGA") to respond with a financial safety net to the insureds of failed insurance companies as provided by U.C.A. 31A-28-202 through 220, as amended. Although Lowe's in did not assert a claim against UPCIGA for indemnity for the claims of Plaintiffs, Collins Taiwan potentially exposed UPCIGA to paying a liability claim against Lowe's and which would have diminished UPCIGA's resources.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Appellant Lowe's respectfully submits that Appellee Collins New Jersey as a matter of law was not entitled to summary judgment dismissing Lowe's claims with prejudice and upon the merits. Lowe's further submits that Appellee Collins Taiwan as a matter of law was not entitled to an order and judgment dismissing Lowe's claims without prejudice. Appellant Lowe's requests that both judgments of dismissal be reversed and set aside as to each Appellee, and that the case be remanded to the trial court for jury trial and such further proceedings as may be appropriate and consistent with the foregoing.

Further, Appellant hereby requests an award of costs on appeal in its favor under U.R.App.P. 34(a) which provides in relevant part:

> "Except as otherwise provided by law, ...if a judgment or order is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment or order is affirmed or reversed in part, or is vacated, costs shall be allowed as ordered by the court..."

Dated this 8th day of June, 2004.

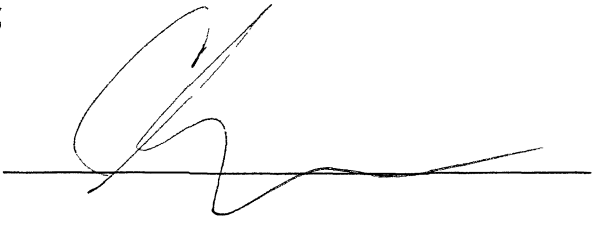
DUNN & DUNN, P.C.

CLIFFORD C. ROSS
Attorneys for Appellant Lowe's

CERTIFICATE OF SERVICE

I certify that on this 8th day of June, 2004 a true and correct copy of the foregoing was served by first class mail, postage prepaid upon the following:

Michael P. Zaccheo
Brandon Hobbs
Richards, Brandt, Miller & Nelson
Key Bank Tower, Seventh Floor
50 South Main Street
PO Box 2465
Salt Lake City, Utah 84110-2465



IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ALLEN R. ERVIN and BLANCHE ERVIN,	:	**MINUTE ENTRY**
	:	**CASE NO. 010903973**
Plaintiffs,	:	
vs.	:	
LOWE'S COMPANIES, INC., a North Carolina Corporation, SHINFA, a Vietnamese Company, and JOHN DOES 1-5,	:	
Defendants.	:	
	:	
LOWE'S COMPANIES, INC., a North Carolina Corporation,	:	
Third Party Plaintiff,	:	
vs.	:	
COLLINS INTERNATIONAL CO., LTD., JOHN DOES I-X,	:	
Third Party Defendants.	:	

Before the Court is a Notice to Submit for Decision on third party defendant Collins' Motion for Summary Judgment. The Court having reviewed the pleadings filed in this matter and having further heard oral argument of counsel, now enters the following ruling.

Collins' Motion for Summary Judgment is granted. The undisputed facts establish the following. That in October, 1996,

defendant and third party plaintiff Lowe's entered into a contractual arrangement with Collins International Co., Ltd., the third party defendant. In that contract, Collins and its subsidiaries agreed to indemnify Lowe's, and to further provide insurance for any claims that might arise. One of Collins' subsidiaries sold a wheelbarrow to Eagle Hardware and Garden, Inc., in May, 1999. Thereafter, Eagle and Lowe's merged in July, 2000.

As to Lowe's contractual claims against Collins, at the time the wheelbarrow was sold and the injury occurred, Eagle and Lowe's had no relationship. The contract at issue was between Lowe's and Collins relative to indemnification and insurance. The contract does not provide indemnification to anyone but Lowe's. No documents have been provided and no evidence has been submitted that Collins' duties under the contract with Lowe's were assigned to Eagle accounts and claims which existed before the merger. Based upon the terms of the contract, the Court determines that there are no provisions providing any benefit to claims for merchandise received by Eagle Hardware.

As to the common law claims asserted against Collins, there is no evidence to indicate that this defendant did anything to manufacture, sell or in any way handle the product at issue. There was at no time any relationship between Collins and Eagle relative

to the wheelbarrow in question, therefore, there was no duty with regard to the product.

Based upon the above, the third party defendant's Motion for Summary Judgment is granted. Counsel for third party defendant Collins is directed to prepare an Order consistent with this ruling.

Dated this 30 day of September, 2002.

SANDRA N. PEULER
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 30 day of September, 2002:

Robert B. Sykes
Ron J. Kramer
Attorneys for Plaintiff
311 S. State, Suite 240
Salt Lake City, Utah 84111

Tim Dalton Dunn
Attorney for Defendant Lowe's
230 South 500 East, Suite 460
Salt Lake City, Utah 84102

Michael P. Zaccheo
Attorney for Third Party Defendant Collins
50 S. Main, 7th Floor
P.O. Box 2465
Salt Lake City, Utah 84110-2465

K Aylotepas

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ALLEN R. ERVIN and BLANCHE ERVIN,	:	MINUTE ENTRY
	:	CASE NO. 010903973
Plaintiffs,	:	
vs.	:	
LOWE'S COMPANIES, INC., a North Carolina Corporation, SHINFA, a Vietnamese Company, and JOHN DOES 1-5,	:	
Defendants.	:	
	:	
LOWE'S COMPANIES, INC., a North Carolina Corporation,	:	
Third Party Plaintiff,	:	
vs.	:	
COLLINS INTERNATIONAL CO., LTD., JOHN DOES I-X,	:	
Third Party Defendants.	:	

Before the Court is third party defendant Collins International Company, Ltd.'s (Collins) Motion to Dismiss the third party claim filed against it by Lowe's Companies, Inc. Based upon a review of the pleadings and oral argument of counsel, Collins' Motion to Dismiss is granted, as the Court lacks jurisdiction over it.

Both parties agree that Collins did not have continuous and substantial contacts with the State of Utah sufficient to confer general personal jurisdiction over the company. The issue, then, is whether there is specific personal jurisdiction. This requires first a determination of whether any Utah statute provides for personal jurisdiction over the nonresident defendant.

In this case, Utah Code Ann., Section 78-27-4, Utah's long-arm statute, confers specific personal jurisdiction if Collins committed certain acts within the state of Utah, which activities relate to the claims made in this lawsuit. The only provision in the long-arm statute having any basis for finding personal jurisdiction is the "causing of any injury within this state." There is no evidence, however, that any act of Collins in the state of Utah had a nexus to the injury caused to the plaintiff. There is a factual dispute regarding what role Collins played in facilitating the manufacturing of the wheelbarrow that caused plaintiff's injury. Even so, it is undisputed that whatever actions undertaken by Collins took place in Taiwan, not in the state of Utah. Therefore, it does not appear that the long-arm statute provides any basis in this case for a finding of personal jurisdiction.

Even if I were to determine, however, that Lowe's allegations sufficiently invoke Utah's long-arm statute, Lowe's has not alleged

sufficient minimum contacts within the state of Utah to satisfy Collins' due process rights relating to the activities which caused the injury. Lowe's has provided no evidence of any contracts during the relevant time period. There is undisputed evidence that Collins did not manufacture the wheelbarrow. At best, the evidence establishes that Collins referred Eagle to a manufacturer in Taiwan who later manufactured the wheelbarrow. There is no evidence that Collins placed the wheelbarrow into the stream of commerce or had anything at all to do with the wheelbarrow that caused the injury. Any actions by Collins that relate to the claims in this lawsuit occurred in a foreign jurisdiction.

It appears, based upon all of the above, that Lowe's has not demonstrated that Collins has sufficient minimum contacts with the State of Utah to cause this Court to exercise specific personal jurisdiction over it. Based upon that, the Motion filed by Collins to dismiss the Third Party Complaint is granted.

Counsel for Collins is directed to prepare an Order consistent with this ruling.

Dated this 30 day of October, 2003.

SANDRA N. PEULER
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 31 day of October, 2003:

Robert B. Sykes
Cory B. Mattson
Attorneys for Plaintiff
311 S. State, Suite 240
Salt Lake City, Utah 84111

Tim Dalton Dunn
Attorney for Defendant Lowe's
230 South 500 East, Suite 460
Salt Lake City, Utah 84102

Michael P. Zaccheo
Attorney for Third Party Defendant Collins
50 S. Main, 7th Floor
P.O. Box 2465
Salt Lake City, Utah 84110-2465

K Gjotepas

LOWE'S MASTER STANDARD BUYING AGREEMENT

This Master Standard Buying Agreement by and between Lowe's Companies Inc. ("LOWE'S") a North Carolina corporation with its principal place of business at Highway 268 East, North Wilkesboro, North Carolina 28659, LOWE'S HOME CENTERS, INC., a North Carolina corporation and a wholly-owned subsidiary of LOWE'S COMPANIES, INC. and THE CONTRACTOR YARD, INC., a wholly-owned subsidiary of LOWE'S HOME CENTERS, INC. and such other wholly-owned subsidiaries will separately and collectively be referred to as "LOWE'S" and the undersigned corporation and/or partnership, hereinafter known as "Vendor" by and through its authorized agent is hereby entered into this 30th day of October, 1996.

WITNESSETH:

WHEREAS, Lowe's is in the business of operating stores for the sale of goods and/or services; and

WHEREAS, the undersigned Vendor is a vendor of products and desires to sell products to Lowe's; and

WHEREAS, every Lowe's Purchase Order, whether written, verbal or electronically communicated by Lowe's to said Vendor is subject to all terms and conditions contained herein, and shall apply to all purchases made by LOWE'S.

NOW, THEREFORE, in consideration of the terms and conditions stated herein and for good and valuable consideration receipt of which is hereby acknowledged by said Vendor, the parties agree to the following:

ARTICLE I. **ACCEPTANCE**

(1) Each Lowe's Purchase Order shall be deemed accepted by the Vendor according to the terms and conditions herein, if any shipment of merchandise is made. There can be no changes or alterations to the Lowe's Purchase Order unless consented to by an authorized agent of Lowe's Merchandising Department.

(2) In case of conflict, this agreement supersedes any signed dealers Agreement.

(3) This document establishes the minimum standards between Lowe's and the Vendor. The Lowe's Purchase Order is void unless given by an authorized agent of Lowe's.

ARTICLE II. **EDI & BARCODING**

(1) Electronic Data Interchange "EDI" is a requirement for all vendors with more than 100 P.O.'s or invoices per year.

(2) LOWE'S requires all vendors to have a scannable Universal Product Code "UPC" label affixed to products sold to Lowe's according to the Uniform Code Council's specifications.

(3) All standard shipping containers (master cartons, bundles, pallets, inner packs, etc.) containing fixed multiples of the same item must have an Interleaved 2 of 5 (UPC Shipping Container Code) placed on the packaging according to the Uniform Code Council's specifications. The model number and unit count contained within each level of packaging must be printed in human readable form.

(4) In the event Vendor fails to apply Vendor's scannable UPC label or scannable Interleaved 2 of 5 codes; labeling product with incorrect UPC bar codes or Interleaved 2 of 5 codes; provides Lowe's with inaccurate UPC or Interleaved 2 of 5 information; applies poor quality, nonscannable UPC label or Interleaved 2 of 5 codes; and/or substitutes merchandise without prior written notification of the new UPC codes or Interleaved 2 of 5 codes; then in that event, Vendor agrees and shall pay Lowe's a penalty for such violation in the amount of One Thousand Dollars ($1,000.00) per each violation. The payment of said penalty is in addition to any other damages that may be incurred as defined under Article VIII, Paragraph 2 of this Agreement.

ARTICLE III. **DELIVERY**

(1) LOWE'S preferred terms of sale are FOB Origin Freight Collect with all Vendor logistics costs netted out of the cost of goods unless otherwise agreed to in writing. LOWE'S further requires Vendor to provide three (3) additional pricing levels as follows:

F.O.B. Origin, Freight Collect to LOWE'S Distribution Centers
F.O.B. Destination, Freight Prepaid to LOWE'S Distribution Centers
F.O.B. Destination, Freight Prepaid to LOWE'S Stores

Vendor is required to provide pricing that adequately reflects and passes on to LOWE'S the savings Vendor incurs due to reduced administrative, labor, transportation, packaging costs and any other cost savings Vendor incurs due to the economies of scale provided by LOWE'S purchase orders. LOWE'S shall have the right to select any of the pricing option(s) described above as its terms of sale during the term of this Agreement, and LOWE'S reserves the right, at its option, to change from one pricing option to another, without limitation, if the Lowe's business so requires.

(2) Regarding FOB Destination orders, no liability is incurred by LOWE'S and the risk of loss shall not pass to LOWE'S until legal title passes upon delivery of the merchandise to LOWE'S final destination(s), in good condition and accepted by LOWE'S.

(3) On all prepaid shipments to Lowe's Distribution Centers, Lowe's Vendor's carriers are required to schedule a delivery appointment with LOWE'S receiving location at least 24 hours in advance of shipment. All shipments to Lowe's stores require 24-hour notification to the Lowe's Receiving Department. LOWE'S will incur no additional charges resulting from extended unloading time for unscheduled deliveries.

(4) If merchandise is purchased prepaid and add, all freight charges must be shown as a separate item on the invoice. The Vendor shall provide, upon request, a copy of the applicable freight bill for each invoice.

(5) Vendor must advise LOWE'S immediately if any merchandise cannot be shipped or picked up in time to be received by the date(s) specified on the individual LOWE'S Purchase Order. Merchandise must not be shipped to arrive prior to the specified date unless consented to by an authorized agent of LOWE'S Merchandising Department. FOB origin shipments must have ship date. Freight prepaid shipments must have an arrival date. If merchandise is shipped or arrives on days other than those specified they are subject to penalty. Vendor warrants, covenants and agrees to ship all Purchase Orders timely and complete.

(6) A detailed packing slip, including item number, the Lowe's Purchase Order number, store number, model number, quantity and shipper's name must accompany each shipment of merchandise.

(7) All cartoning must be capable of withstanding the normal rigors of the transportation and physical distribution process. All master cartons must protect inner packs and individual sales units which will be displayed on LOWE'S sales floors. Any such concealed damage discovered upon receipt will be returned to the Vendor freight collect.

(8) LOWE'S requires unitization on all merchandise. The preferred method of unitization is through the use of pallets. All pallets must be 48"x40" hardwood with 4-way forklift entry. All units must be stretch-wrapped prior to shipment. Any exception to LOWE'S unitization requirements must be approved in advance by LOWE'S Logistics Department.

(9) Multiple orders on the same truck must be segregated. Identical items on each Lowe's Purchase Order must be unitized.

(10) All transportation costs or expenses incurred by LOWE'S because of Vendor's noncompliance with the terms of an order, and any additional transportation or administrative charges due to split shipments, failure to follow LOWE'S routing instructions, errors in classification of merchandise, or for any other reason, shall be charged back to Vendor.

(11) Vendor is responsible, at its cost, for insuring the merchandise to the F.O.B. point for full replacement value, including freight, and Vendor shall file all claims for loss or damage. All uncollectible portions of concealed damage claims will be charged back to Vendor.

(12) No backorders will be accepted.

(13) Accumulation of Less-than Truck Load "LTL" shipments is not allowed. Vendors/Carriers must adhere to the specified ship dates and arrival date per the designated routings.

ARTICLE IV. **INVOICING/BILLING REQUIREMENTS**

(1) All invoice and/or credit memorandum transactions regarding merchandise purchased for resale should be mailed or electronically transmitted promptly and accurately to the specified address or Third Party Value Added Network mailbox. All billing related transactions that cannot be processed due to their failure to comply with LOWE'S billing requirements may be returned for re-billing or held for correction without the loss of applicable discounts. LOWE'S shall not be held liable for lost discount, interest and/or service charges related to the late payment of invoices which were delayed due to reasons beyond LOWE'S control. Vendors may be subject to an administrative processing charge for non-compliance.

(2) All invoices, credit memorandums, bills of lading, related documents and other correspondence must reference LOWE'S Purchase Order Number or Assigned Control Number (Example: RMR #) and the specific LOWE'S store number(s) to which the transactions apply. In addition, Vendor must provide LOWE'S item numbers on invoices and packing slips as well as list line items in the same sequence as ordered. In lieu of requiring proof of shipment on all invoices, LOWE'S reserves the right to request proof of shipment or proof of delivery for selected transactions at a later date.

(3) LOWE'S pays from invoice only. Vendor shall submit one invoice per Order (shipment) and one Order per invoice with no backorders being allowed by LOWE'S. Invoicing should be initiated on the day of shipment (not before) and reference the correct F.O.B. terms as well as the freight payment responsibility (collect or prepaid). LOWE'S reserves the right to charge back to the Vendor any shortages between merchandise received and merchandise invoiced .

(4) Payment will be made in accordance with the terms mutually agreed upon in writing between the parties. Any deviation from the negotiated payment terms must be communicated and agreed to in writing by LOWE'S prior to invoicing.

Payment terms begin on the date of satisfactory receipt of all merchandise being invoiced, or receipt of a correctly completed invoice, whichever is later without loss of discount. It will be LOWE'S policy to calculate an average transit time for each Vendor. The average transit days for a specific Vendor will be added to invoice/shipment date to determine the day on which dating is to begin. On all Prox. and E.O.M. (end of the month) dating, merchandise received after the 24th of any month shall be payable as if received on the 1st day of the following month. LOWE'S interprets payment due date as the day the remittance is to be mailed.

(5) LOWE'S policy will be to include unit pricing on all outgoing EDI Lowe's Purchase Orders. Vendor agrees to notify LOWE'S of any price discrepancies prior to shipment/invoicing. Failure to communicate irregularities will result in a LOWE'S deduction which will not be refunded. Vendor further agrees that if prior to shipment there is any reduction in Vendor's regular selling price for the merchandise, the price specified on the Purchase Order will be reduced to the lower price. LOWE'S requires a minimum 60 days written notice for all price increases. A price increase cannot take effect until 30 days after LOWE'S authorized agent agrees (by letter) to accept. In addition, it is agreed that for price increases LOWE'S Purchase Order date determines applicable price and on price decrease invoice/shipment date determines applicable price.

(6) If Vendor has a debit balance with LOWE'S, the amount owed will be deducted from the next remittance or a check from the Vendor to clear this amount will be paid within thirty (30) days at the option of LOWE'S. It is also agreed that LOWE'S has the option to perform post audits and file claims for billing/payment errors on prior years business transactions. These audits will normally be completed within 24 months of the end of a calendar year.

ARTICLE V. **WARRANTIES & GUARANTEES**

(1) Vendor agrees that LOWE'S shall not be liable for the inspection of merchandise before resale and that all warranties expressed or implied, shall survive inspection, acceptance and payment by LOWE'S and LOWE'S customers.

(2) Approval by LOWE'S of Vendor's design or materials shall not relieve Vendor from any obligations under any warranties, representations or guarantees. Merchandise delivered (whether paid for or not) are subject to inspection, testing and approval by LOWE'S before acceptance. Vendor warrants that the merchandise will be of good quality, material and workmanship, merchantable and free from any and all defects.

(3) Vendor, by accepting the order, warrants, represents and guarantees that all applicable provisions of federal, state and local laws, ordinances, codes, rules and regulations have been fully complied with and that the price and other terms and conditions of sale, the terms on which all promotional and advertising matter are furnished by Vendor to LOWE'S and all guarantees, warranties, labels and instruction furnished in connection therewith comply with all such laws, ordinances, codes, rules and regulations.

(4) Vendor, by accepting the Order, warrants, represents and guarantees their merchandise. Vendor agrees to provide LOWE'S with a signed guaranty form, if prescribed by the respective laws, ordinances, codes, rules or regulations as part of Vendor's invoice, before payment is required to be made under the terms of the Order, without loss of discount: that the weights, measures, signs, legends, words, particulars or descriptions (if any) stamped, printed or otherwise attached to the merchandise or containers or referring to the merchandise delivered hereunder are true and correct and comply with all applicable laws, ordinances, codes, rules and regulations; and that the merchandise delivered pursuant to the Order conforms and complies with the applicable

provisions of the Consumer Product Safety Act, Magnuson - Moss Warranty - Federal Trade Commission Improvement Act, Wool Products Labeling Act, Federal Food, Drug and Cosmetics Act, Federal Hazardous Substances Act, all other applicable laws, ordinances, codes, rules and regulations of any governmental agencies having jurisdiction and the standards of the Underwriters Laboratories, Inc.

(5) With acknowledgment that the terms and conditions of this paragraph have been expressly bargained for and are an essential part of the Order, and in consideration of any and all purchases heretofore, herein and hereafter, made by LOWE'S from Vendor or from affiliates or subsidiaries of Vendor, and by accepting the Order, Vendor agrees to and shall indemnify LOWE'S, "LOWE'S" means collectively LOWE'S COMPANIES, INC., its subsidiaries and affiliates, including but not limited to LOWE'S COMPANIES, INC., LOWE'S HOME CENTERS, INC., THE CONTRACTOR YARD, INC. and all employees, officers, directors and agents of LOWE'S COMPANIES, INC., LOWE'S HOME CENTERS, INC., THE CONTRACTOR YARD, INC. and their subsidiaries and affiliates and hold harmless LOWE'S from and against any and all liability and/or losses and/or damages, whether compensatory or punitive, which may be assessed against LOWE'S as is further set forth below. Vendor's obligation to indemnify and hold harmless LOWE'S shall include, but not be limited to, any and all claims, lawsuits, appeals, actions, assessments, product recalls, decrees, judgments, orders, investigations, civil penalties or demands of any kind, including court costs, expenses and attorney's fees, which may be made or brought against LOWE'S or third parties of said merchandise; any allegation of or actual mis-representation or breach of warranty, expressed or implied, in fact or by law, with respect to the possession, purchase or use of said merchandise; any alleged bodily injury or property damage related to the possession or use of said merchandise; any alleged infringement claims of any patent, design, trade name, trademark, copyright or trade secret; any alleged violation by Vendor or any law ordinance code rule or regulation; any alleged or threatened discharge, release or escape of pollutants or other environmental impairment; or any breach or violation by Vendor of any terms or

conditions of the Order. Vendor shall pay all judgments against and assume the defense within a reasonable time for any and all liability of LOWE'S with respect to any such matters, even if any such allegation of liability is groundless, false or fraudulent. Notwithstanding the above, LOWE'S shall have the right but not the obligation to participate as it deems necessary in the handling, adjustment or defense of any such matter. Further, for the term of this Agreement and hereafter, Vendor releases Lowe's (and any of its subsidiaries or associated companies), from any claim based on Vendor's patent, copyright, trademark, trade dress or other intellectual property rights. Lowe's, at its sole discretion, shall have the right to purchase from other sources those products manufactured or offered by Vendor free of any patent, copyright, trademark, trade dress or other intellectual property rights of Vendor.

Should Vendor fail to assume its obligations hereunder, to diligently pursue and pay for the defense of LOWE'S within a reasonable time, Vendor hereby agrees that LOWE'S shall have the right, but not the obligation, to proceed on LOWE'S own behalf to defend itself by way of engaging its own legal counsel and the services of any and all other experts or professionals it deems necessary to prepare and present a proper defense, and to thereafter require from Vendor reimbursement and indemnification for all costs and expenses incurred in such defense and for any and all penalties, judgments, fines, interest or other expenses to incurred as a result of such claim, lawsuit, appeal, action, assessment, civil penalty, product recall, decree judgments, orders or demands as more fully set forth above.

(6) During the term of this Agreement and for a period of five (5) years after the date of termination, Vendor shall procure and maintain Products Liability and completed Operations Liability Insurance on an occurrence basis with limits of not less than $2,000,000 per occurrence and an annual aggregate of not less than $10,000,000 for property damage, bodily injury or death to any number of persons, and other adequate insurance, which shall contain an endorsement by which the insurer extends the coverage thereunder to the extent necessary to include the contractual liability of

Vendor arising by reason of the indemnity provisions set forth herein. A broad form Vendor's endorsement shall be maintained in said insurance policy with LOWE'S and its wholly owned subsidiaries as an additional insured, requiring coverage for all other underlying and collectible insurance. Vendor further agrees to forward a copy of this Vendor Buying Agreement to its insurer, and as a condition precedent to LOWE'S obligation hereunder, to have delivered to LOWE'S by the Vendor's insurer a current certificate of insurance showing the coverage required by this provision. The insurance must be written by an insurance company with a minimum rating of Best's A-, VIII or its equivalent, satisfactory to LOWE'S, and duly incorporated in the United States of America. Additionally Vendor and its insurer shall provide LOWE'S thirty (30) days prior written notice of non-renewal, cancellation or other change in Vendor's coverage which may impair or otherwise effect LOWE'S rights thereunder.

(7) Vendor is a corporation and/or partnership duly organized, validly existing, and in good standing under the laws of the State in which it is either incorporated or filed; said Vendor has the requisite corporate power and/or authority and the legal right to enter into this Agreement, and to conduct its business as now conducted and hereafter contemplated to be conducted; and is in compliance with its Articles of Incorporation and Bylaws or its Partnership Agreement. The execution, delivery and performance of this Agreement and all instruments and documents to be delivered by Vendor are within the Vendor's corporate power and/or partnership agreement have been duly authorized by all necessary or proper action, including the consent of shareholders if required; do not and will not contravene any provisions of the Vendor's Articles of Incorporation or Bylaws and/or Partnership Agreement. This Agreement has been duly executed and delivered by Vendor, and constitutes the legal, valid, and binding obligation of the Vendor and enforceable against the Vendor in accordance with its terms.

(8) Vendor acknowledges that Vendor and its officers, directors, employees and agents have received a copy of Lowe's Code of Ethics and Statement of Business

Ethics. Vendor along with its officers, directors, employees and agents hereby warrant, covenant and agree to perform in strict compliance with the Lowe's Code of Ethics, Lowe's Statement of Business Ethics, and all applicable laws.

ARTICLE VI. MERCHANDISE RETURNS

(1) Notice of defects in the merchandise or any other breach by Vendor under the terms of this Agreement and the individual Lowe's Purchase Order will be considered made within reasonable time, if made within a reasonable time after being discovered by LOWE'S or after notification is given to LOWE'S by its customers or the users of the merchandise. The return of such merchandise shall not relieve Vendor from liability for failure to ship conforming merchandise under the Lowe's Purchase Order or for liability with respect to warranties, expressed or implied. Failure of LOWE'S to state a particular defect upon rejection shall not preclude LOWE'S from relying on unstated defects to justify rejection or establish breach. Resale, repackaging, repacking or cutting up for the purpose of resale or for use shall not be considered as acceptance of the merchandise so as to bar LOWE'S right to reject such merchandise or to revoke acceptance.

(2) Vendor agrees that in the absence of a negotiated and signed Defective Merchandise Return Policy, LOWE'S will adhere to the following general guidelines. Specifically, defective merchandise (item) with a value of under seventy-five dollars ($75) will be destroyed by LOWE'S and if the value is over seventy-five dollars ($75), the merchandise (item) will be shipped back by LOWE'S freight collect without obtaining Vendor return authorization. Vendor further agrees to reimburse LOWE'S for the merchandise (item) at P.O. delivered cost. In addition, if the merchandise is shipped back on a prepaid freight basis, Vendor agrees to reimburse LOWE'S for the actual freight expense or fifteen percent (15%) of merchandise value, if the merchandise is returned via United Parcel Service.

ARTICLE VII. CANCELLATIONS & RETURNS

(1) LOWE'S Merchandising Department reserves the right to refuse or return any Orders not shipped complete, as ordered and in accordance with the terms in this Agreement and the specifics as outlined in the Lowe's Purchase Order which includes the requested ship and arrival dates.

(2) LOWE'S Merchandising Department reserves the right to cancel in whole or in part any Purchase Order at any time prior to the shipment of merchandise on the Purchase Order without incurring any liability.

ARTICLE VIII. MISCELLANEOUS

(1) Both parties acknowledge that this Standard Master Buying Agreement forms the Agreement. Performance of any Lowe's Purchase Order must be in accordance with all of the terms and conditions stated herein. There can be no changes or modifications to the Standard Master Buying Agreement, unless in writing and signed by a Vice President of LOWE'S Merchandising Department. In absence of any agreements signed by Vendor, this Agreement represents the entire agreement of the parties.

(2) All costs, loss profits and expenses incurred by LOWE'S due to Vendor's violations of or failure to follow any or all of the terms of this Agreement will be charged back to Vendor and Vendor expressly agrees to reimburse LOWE'S for all such costs, loss profits and expenses. Vendor further agrees that LOWE'S may deduct such costs, loss profits and expenses from any sum thereafter owing to Vendor by LOWE'S under any Orders between LOWE'S and Vendor.

(3) Any and all taxes, fees, imposts or stamps required by State, Federal or Municipal Governments in the selling, transferring or transmitting of merchandise to LOWE'S shall be paid and assumed by Vendor.

(4) No provisions of this Agreement shall be waived or shall be construed to be waived by LOWE'S unless such waiver is in writing and signed by an authorized agent of LOWE'S. No failure on the part of LOWE'S to exercise any of the rights and remedies granted hereunder or to insist upon strict compliance by Vendor shall constitute a waiver of LOWE'S right to demand exact compliance with the terms hereof. The Vendor hereby waives use of the statute of frauds as a defense to any Order accepted pursuant to this Agreement.

(5) The rights, remedies and options provided herein are in addition to and not to the exclusion of any and all other rights and remedies provided by law.

(6) LOWE'S shall not be bound by any assignment of the Order by Vendor, unless LOWE'S has consented prior thereto in writing. LOWE'S may assign this Order to a present or future subsidiary or affiliate.

(7) Should LOWE'S use the services of an attorney to enforce any of its rights hereunder, or to collect any amounts due, Vendor shall pay LOWE'S for all costs and expenses incurred, including reasonable attorney's fees.

(8) This Agreement shall be construed and enforced in accordance with the laws of the State of North Carolina. The parties agree that the courts within the State of North Carolina will have exclusive jurisdiction with venue being in Wilkes County, State of North Carolina.

(9) Vendor agrees to furnish, when returning this completed Agreement, a complete set of current financial statements. Publicly held companies should include the

Annual Report to Shareholders and 10K Report. If financial statements are not available, a Dun & Bradstreet should be furnished.

(10) The Vendor shall provide LOWE'S written notice of an assignment, factoring or other transfer of its right to receive payments arising under this Agreement 30 days prior to such assignment, factoring or other transfer taking legal effect. Such written notice shall include the name and address of assignee/transferee, date assignment is to begin, and terms of the assignment and shall be considered delivered upon receipt of such written notice by the Trade Payables Department. Vendor shall be allowed to have only one assignment, factoring or transfer legally effective at any one point in time. No multiple assignments, factoring or transfers by the Vendor shall be permitted. LOWE'S reserves the right to require any and all documentation in reference to the legal effect of the assignment, factoring or other transfer as determined needed by Lowe's Corporate Counsel prior to accepting the assignment, factoring or other transfer by LOWE'S.

(11) Vendor shall indemnify LOWE'S against and hold LOWE'S harmless from any and all lawsuits, claims, actions, damages (including reasonable attorney fees, obligations, liabilities and liens) arising or imposed in connection with LOWE'S for amounts due and owing under this Agreement where Vendor has not complied with the notice requirements of this section.

(12) Vendor, by accepting the order, warrants, represents and guarantees that all labor used by the Vendor and/or its Vendors or Suppliers is furnished by employees with a minimum age of no less than 16 years. Vendor acknowledges LOWE'S policy of purchasing products from Vendors who do not use child labor in the production of goods.

(13) Vendor, by accepting the order, warrants, represents and guarantees that all labor in producing the goods by the Vendor and/or its Vendors or Suppliers is not

furnished, manufactured, produced, or distributed, wholly or in part by convicts or prisoners, except convicts or prisoners on parole, supervised release, or probation, or in any penal or reformatory institution.

(14) Vendor, by and through its representative, further covenants and agrees not to communicate during the continuance of this agreement, or at any time subsequently, any information relating to the secrets, business methods, business secrets, including trade secrets, business information, and the corporation manner in which Lowe's conducts its business to any person, corporation or entity. Vendor acknowledges and agrees that Vendor has and will receive confidential information including, but not limited to: Proprietary packaging, proprietary product(s) and/or product design(s), Lowe's business and confidential data which includes quotations, sales volume, pricing, etc. and that money damages will not adequately compensate Lowe's for any disclosure of any information in violation of this agreement. Any right of equitable enforcement granted to Lowe's shall not be deemed to preclude Lowe's from seeking actual money damages or any other remedy from Vendor and/or its agents in the event of a breach of such covenant.

Confidential information is not meant to include any information which, at the time of disclosure, is generally known by the public.

(15) At any time during the term of this Agreement and for a period of five (5) years after the final payment of any invoice under this Agreement, Lowe's, or its designated agent, shall have the right to examine and audit up to five (5) years of the Vendor's records in respect to any and all matters occurring within the five (5) year period prior to the request and relating to Lowe's payments under this Agreement, including, but not limited to, payments for any orders, invoices, and Vendor's compliance with Lowe's business ethics policies and Lowe's Code of Ethics. Vendor shall maintain complete and accurate records to substantiate Vendor's charges, pursuant to this Agreement. By execution of this Agreement by Vendor, Lowe's shall have

access to such records for the purpose of audit during normal business hours upon reasonable notice to Vendor.

(16) The initial term of this Agreement is for one (1) year commencing on the date first written above and shall automatically renew on a year-to-year basis thereafter, unless terminated by written notice by either party not later than sixty (60) days prior to the end of the then current term.

IN WITNESS WHEREOF, LOWE'S COMPANIES, INC. and the undersigned Vendor have hereunto set their hands as of the date of this Agreement.

ATTEST:

LOWE'S COMPANIES, INC.

BY: _____

TITLE: SVP/GMM

Received and accepted:

ATTEST:

Collins International Co., Ltd.

BY: _____

A. G. Church

TITLE: Account Executive

GMK Revised 9/30/96

VENDOR NAME COLLINS CO., LTD.

LGS MASTER STANDARD BUYING AGREEMENT

This Master Standard Buying Agreement by and between L G Sourcing, Inc. (hereinafter referred to as "LGS") a North Carolina corporation with its principal place of business at North Wilkesboro, North Carolina 28659, having a mailing address of P. O. Box 1535, a wholly-owned subsidiary of LOWE'S COMPANIES, INC. and the undersigned corporation and/or partnership, including such other wholly-owned subsidiaries, its parent, all associated trading companies and manufacturer's associates (hereinafter referred to as "Vendor"), by and through its authorized agent is hereby entered into this 26TH day of SEPTEMBER, 2000.

WITNESSETH:

WHEREAS, LGS is in the business of procuring products on behalf of certain other entities who sell the products at retail; and

WHEREAS, the undersigned Vendor is a manufacturer of products and desires to sell products to LGS for eventual sale to LGS' customers, who will sell the goods at retail in the United States and Canada; and

WHEREAS, every LGS Purchase Order, whether written, verbal or electronically communicated by LGS to said Vendor is subject to all terms and conditions contained herein, and shall apply to all purchases made by LGS.

NOW, THEREFORE, in consideration of the terms and conditions stated herein and for good and valuable consideration receipt of which is hereby acknowledged by said Vendor, the parties agree to the following:

Vendor Name: _____

ARTICLE I. **ACCEPTANCE**

(1) Every LGS Purchase Order, whether written, verbal or electronically communicated to Vendor is subject to all of the terms and conditions contained in this Agreement, the terms and conditions contained herein shall apply to all purchases by LGS from Vendor. There can be no changes or alterations to the LGS Purchase Order unless consented to in writing by an authorized representative of LGS.

(2) In case of any conflict, this Agreement supersedes all previous or simultaneous agreements between the parties. Further, this Agreement supersedes any future agreements between the parties unless said future agreements are executed by an officer of LGS.

(3) This Agreement establishes the minimum standards between LGS and the Vendor.

(4) Any LGS Purchase Order is void unless given by an authorized representative of LGS.

ARTICLE II. **EDI & BARCODING**

(1) Electronic Data Interchange "EDI" may be a requirement for all vendors with more than 100 LGS Purchase Orders or invoices per year. LGS, at its sole option, may require Vendor to receive LGS Purchase Orders, submit its requests for payment, and other documents via EDI.

(2) LGS requires all vendors to have a scannable Universal Product Code "UPC" label affixed to products sold to LGS according to the Uniform Code Council's specifications. A scannable UPC label shall be affixed to each unit of each product sold by Vendor to LGS.

(3) All standard shipping containers (master cartons, bundles, pallets, inner packs, etc.) containing fixed multiples of the same item must have an Interleaved 2 of 5 (UPC Shipping

Container Code) code placed on the packaging according to the Uniform Code Council's specifications. LGS, at its sole option, may require Vendor to provide to LGS samples of the Interleaved 2 of 5 code and UPC labels for approval prior to their application to the containers and products. The model number of the products and unit count contained within each level of packaging must be printed on each level of packaging in human readable form.

(4) In the event Vendor: (1.) fails to apply an acceptable scannable UPC label or acceptable, scannable Interleaved 2 of 5 codes, (2.) labels products with incorrect UPC bar codes or Interleaved 2 of 5 codes, (3.) provides LGS with inaccurate UPC or Interleaved 2 of 5 information, (4.) applies poor quality, nonscannable UPC label or Interleaved 2 of 5 codes, (5.) substitutes products without prior written notification of the new UPC Codes or Interleaved 2 of 5 codes and/or (6.) otherwise fails to meet Lowe's requirements for coding and labelling, Vendor shall pay LGS a penalty for each such Violation in the amount of One Thousand U.S. Dollars (US$1,000.00) per each Violation. The payment of said penalty is in addition to any other damages or remedies that may be incurred as defined herein or otherwise allowable by law. For the purpose of this Article II, a "Violation" shall be defined as each shipping container which is not properly coded as required herein and each, individual unit of product that is not labeled as required herein.

ARTICLE III. **DELIVERY AND PRICING**

(1) LGS preferred terms of sale are FOB Port with the Vendor providing all the ex-port license, ex-port taxes and all fees. The Vendor shall deliver the products "On Board" the ship and provide a Clean Bill of Lading without any stipulations. LGS further requires Vendor to provide three (3) additional pricing levels, in which said pricing levels must be submitted on an LGS International Vendor Offer Sheet, which is attached hereto and incorporated herein by reference as if fully set forth herein as Exhibit 1, as follows:

FOB Consolidation Center
Ex Works
CIF-Indicate Port of Call

Vendor is required to provide pricing that adequately reflects and passes on to LGS the savings Vendor incurs due to reduced administrative, labor, transportation, packaging costs and any other cost savings Vendor incurs due to the economies of scale provided by LGS Purchase Orders. LGS shall have the right to select any of the pricing option(s) described above as its terms of sale during the term of this Agreement, and LGS reserves the right, at its option, to change from one pricing option to another, without limitation, if the LGS business so requires.

(2) Regarding CIF orders, no liability is incurred by LGS and the risk of loss shall not pass to LGS until legal title passes upon delivery of the products to LGS final destination(s), in good condition and accepted by LGS.

(3) Vendor must advise LGS immediately if any products cannot be shipped or picked up in time to be received by the date(s) specified on the individual LGS Purchase Order. Products must not be shipped to arrive prior to the specified date unless consented to by an authorized representative of LGS. FOB Consolidation Center shipments must have ship date. CIF shipments must have an arrival date. If products are shipped or arrive on days other than those specified they are subject to penalty. Vendor warrants, covenants and agrees to ship all Purchase Orders timely and complete.

(4) A detailed packing slip, including item number, the LGS Purchase Order number, LGS' customers store number, model number, quantity and shipper's name must accompany each shipment of products.

(5) All cartoning must be capable of withstanding the normal rigors of international transportation and physical distribution process as outlined in LGS Loading, Shipping Cargo Requirement Program, which is attached hereto and incorporated herein by reference as fully set forth herein as Exhibit 2. Vendor shall adhere to all requirements as set forth in the LGS Loading, Shipping Cargo Requirement Program. All master cartons must protect inner packs and individual sales units which will be displayed on US/Canadian retailer sales floors. Products that have

concealed damage that originated with the Vendor or while Vendor had the risk of loss which is discovered upon receipt of the products by LGS or LGS' customer will be destroyed by LGS or LGS' customer without prior approval from Vendor. Vendor shall reimburse LGS for the cost of the damaged products, the pro rata cost of the transportation charges for said products and any other amounts lost by LGS or LGS' customer (including lost profits) occasioned by the concealed damage.

(6) Multiple orders on the same ocean container must be segregated. Identical items on each LGS Purchase Order must be grouped together.

(7) All transportation costs or expenses incurred by LGS because of Vendor's noncompliance with the terms of an order, and any additional transportation or administrative charges due to split shipments, failure to follow LGS routing instructions, errors in classification of products, or for any other reason, shall be charged back to Vendor.

(8) Vendor is responsible, at its cost, for insuring the products to the FOB point for full replacement value, including freight, and Vendor shall file all claims for loss or damage. All uncollectible portions of concealed damage claims will be charged back to Vendor. Risk of loss shall not shift from the Vendor to LGS until the Vendor and/or its agent has delivered the products to the appropriate LGS and/or LGS' customers location.

(9) No backorders will be accepted.

(10) Accumulation of orders to fill a container unless specified by LGS is not allowed. Vendors/Carriers must adhere to the specified ship dates and arrival date per the designated routings.

(11) Each unit of each product as well as all product packaging must be marked with the Country of Origin either stamped, printed or forged in a size and location which complies with the United States Custom Regulations, Canadian Custom Regulations and any applicable United States or Canadian law, rule, regulation or administrative requirements. Products which have been determined to be out of compliance either by LGS or any appropriate governmental authority will be either: (1) returned to Vendor, at Vendor's expense, in which case Vendor shall reimburse LGS for all costs associated with said products, a pro rata share of transportation charges, lost profits and any additional damages which may be applicable or (2) LGS or its customers may choose to properly mark any product out of compliance; in such case, Vendor shall reimburse LGS for all costs associated with said marking, any costs of any applicable transportation charges, lost profits and any additional damages which may be applicable.

(12) Vendor shall place specific markings on the product(s) in order to identify the manufacturing month and year, as described in LGS' Product Identification and Traceability Program, which is attached hereto and incorporated herein by reference as fully set forth herein as Exhibit 3.

ARTICLE IV. **INVOICING/BILLING REQUIREMENTS**

(1) All invoice and/or credit memorandum transactions regarding products purchased for resale should be mailed or electronically transmitted promptly and accurately to the specified address or Third Party Value Added Network mailbox, to which the Vendor acknowledges LGS

has provided to Vendor information and specifics. All billing related transactions that cannot be processed due to their failure to comply with LGS billing requirements may be returned for re-billing or held for correction without the loss of applicable discounts. LGS shall not pay interest, service charges or any similar penalty, nor shall LGS lose any applicable discount caused by the late payment of invoices in which payment was delayed due to reasons beyond LGS' control. Vendors may be subject to an administrative processing charge for non-compliance.

(2) All invoices, credit memoranda, bills of lading, related documents and other correspondence must reference the applicable LGS Purchase Order Number or Assigned Control Number (Example: RMR #) and the specific LGS' customer store number(s) to which the transactions apply. In addition, Vendor must provide LGS item numbers on invoices and packing slips as well as list line items in the same sequence as ordered. In lieu of requiring proof of shipment on all invoices, LGS reserves the right to request proof of shipment or proof of delivery for selected transactions at a later date.

(3) In respect to products purchased through the LGS open account order process, LGS pays from invoice only pursuant to LGS Import Procedures For Open Account, which is attached hereto and incorporated herein by reference as set forth herein as Exhibit 4. Vendor acknowledges that LGS is not obligated to pay any invoice until the full LGS Purchase Order of the products ordered are received pursuant to the delivery terms agreed upon between the parties. Vendor shall submit one invoice per LGS Purchase Order (shipment) and one LGS Purchase Order per invoice with no backorders being allowed by LGS. Invoicing should be initiated on the day of shipment

(not before) and reference the correct F.O.B. terms as well as the freight payment responsibility (collect or prepaid). LGS reserves the right to charge back to the Vendor any shortages between products received and products invoiced. Vendor acknowledges that vendor must comply with all of the requirements as set forth in the LGS Import Procedures For Open Account to receive payments for products purchased by LGS.

(4) In respect to products purchased by LGS from Vendor which are to be paid by a Letter of Credit, Vendor shall follow all requirements as set forth in the LGS Letter of Credit and any other LGS documents associated with said purchase. Vendor acknowledges that LGS is not obligated to pay any invoice until the full order of the products ordered are received pursuant to the delivery terms agreed upon between the parties.

(5) Payment will be made in accordance with the terms mutually agreed upon in writing between the parties. Any deviation from the negotiated payment terms must be communicated and agreed to in writing by LGS prior to accepting an order. Payment terms begin on the date of satisfactory receipt of all required documents which comply with the stipulations set forth in in the open account policies of LGS. The average transit time for a specific Vendor will be added to invoice/shipment date to determine the day on which dating is to begin. On all Prox. (approximate date) and E.O.M. (end of the month) dating, products received after the 24th of any month shall be payable as if received on the 1st day of the following month. LGS interprets payment due date as the day the remittance is to be mailed.

(6) LGS policy will be to include unit pricing on all outgoing EDI LGS Purchase Orders. Vendor agrees to notify LGS of any price discrepancies prior to shipment/invoicing. Failure to communicate irregularities will result in a LGS deduction which will not be refunded. Vendor further agrees that if prior to shipment there is any reduction in Vendor's regular selling price for the products, Vendor shall notify LGS of the reduced selling price and the price specified on the LGS Purchase Order will be reduced to the lower price. LGS requires a minimum 60 days written notice for all price increases. A price increase cannot take effect until 30 days after LGS authorized representative agrees (by letter) to accept the proposed price increase. In addition, it is agreed that for price increases LGS Purchase Order date determines applicable price and on price decrease invoice/shipment date determines applicable price.

(7) If Vendor has a debit balance with LGS, the amount owed will be deducted from the next remittance or a check from the Vendor to clear this amount will be paid within thirty (30) days at the option of LGS. It is also agreed that LGS has the option to perform post audits and file claims for billing/payment errors on prior years business transactions. These audits will normally be completed within 24 months of the end of a calendar year.

(8) Vendor acknowledges that Vendor has provided LGS its best pricing and delivery terms in respect to the sale of its products to LGS. Vendor acknowledges that should the terms become more favorable after execution of this Agreement or any purchase order(s) made pursuant to this Agreement, then in that event, the terms of this Agreement or any purchase order(s) automatically shall change to the more favorable terms. LGS shall have the exclusive discretion in

determining if the terms become more favorable after the execution of this Agreement or any purchase order(s) made pursuant to this Agreement.

(9) Vendor acknowledges that at LGS' sole discretion, LGS and its agents, have the authority to enter upon Vendor's premises for the purpose of inspecting its manufacturing facilities, the procedures used by Vendor in manufacturing applicable products, its work place, etc. to assure compliance with Vendor's obligations under this Agreement or any pertinent laws, orders or decrees applicable to LGS and LGS' customers.

ARTICLE V. WARRANTIES & GUARANTEES

(1) Vendor agrees that LGS shall not be liable for the inspection of products before resale and that all warranties set out herein or otherwise (whether expressed or implied) shall survive inspection, acceptance and payment by LGS and LGS customers.

(2) Approval by LGS of Vendor's product design or materials used in products shall not relieve Vendor from any obligations under any warranties, representations or guarantees. Products delivered (whether paid for or not) are subject to inspection, testing and approval by LGS before acceptance. Vendor acknowledges its obligations under the warranties, guarantees and representations of this Agreement are not relieved even if LGS or LGS' customer approves or accepts the products or if the designs or the specifications of the products purchased by LGS

originated with LGS. Vendor warrants that all products will be of good quality, material and workmanship, merchantable and free from any and all defects. Vendor shall comply and adhere to the procedures as set forth under the LGS Quality Acceptance Program, which is attached hereto as Exhibit 5 and incorporated herein by reference as fully as set forth.

(3) Vendor, by entering into this Agreement and accepting any LGS Purchase Order, warrants, represents and guarantees that all applicable laws, ordinances, codes, rules, regulations and provisions of the Country of Origin of any product, any country in which a component part of any product is manufactured, Canada, the United States of America, each U.S. state and each locality where products are sold has been fully complied with as it relates in any way to the manufacture, packaging, shipment, sale and use of all products. Further, Vendor warrants, represents and guarantees that all applicable industry, trade, safety and other regulations have been fully met with respect to the manufacture, packaging, shipment, sale and use of all products. Vendor also warrants, represents and guarantees that the price and other terms and conditions of sale, the terms on which all promotional and advertising matter are furnished by Vendor to LGS and all guarantees, warranties, labels and instructions furnished in connection with any product comply with all applicable laws, ordinances, codes, rules and regulations.

(4) Vendor, by entering into this Agreement and accepting any LGS Purchase Order, warrants, represents and guarantees its products and that all products comply with any and all applicable LGS specifications.

(5) Vendor represents, warrants and guarantees that the weights, measures, signs, legends, words, particulars or descriptions (if any) stamped, printed or otherwise attached to the products or containers are true and correct and comply with all applicable laws, ordinances, codes, rules and regulations; and that the products delivered pursuant to this Agreement or any LGS Purchase Order, as well as all activities by or on behalf of Vendor in designing, manufacturing, packing, shipping and otherwise handling any product under this Agreement, fully conform and comply with all laws and regulations of the United States, Canada and the country of origin of all products (and components thereof) pertaining to the environment, public safety and health and the transportation of hazardous materials, including, without limitation, all applicable provisions of the United States Consumer Product Safety Act; the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act; the Consumer Products Safety Act; the Wool Products Labeling Act; the Food, Drug and Cosmetics Act; the Hazardous Materials Transportation Act; the Solid Waste Disposal Act, including the Resource Conservation and Recovery Act; the Comprehensive Environmental Response, Compensation, and Liability Act; the Federal Insecticide Fungicide, and Rodenticide Act (FIFRA); the Toxic Substances Control Act (TSCA); the Marine Mammal Protection Act; the Endangered Species Act; the Forest and Rangeland Renewable Resources Planning Act of 1974; the Federal Water Pollution Control Act; the Clean Air Act; the Noise Control Act; the National Environmental Policy Act; the Safe Drinking Water Act; the Emergency Planning and Community Right-to-Know Act; the Pollution Prevention Act of 1990; the Atomic Energy Act; and all other similar international, federal, regional, state, or local statutes, rules, regulations, guidance, memoranda, decisions, and other interpretations by any agency implementing those requirements; and all applicable standards of the Underwriters Laboratories,

Inc.; the American Society for Testing Materials (ASTM); the National Fire Protection Association (NFPA); American National Standards Institute (ANSI); the International Standards Organization (ISO); and other similar standards organizations; and any and all amendments, modifications and updates of all of the foregoing (collectively, the statutes, rules, regulations, guidance, memoranda, decisions, interpretations, and standards referred to in this sentence are hereafter referred to as "Standards"). Vendor further agrees that the weights, measures, signs, legends, words, particulars or descriptions (if any) stamped, printed or otherwise attached to the products or containers or referring to the products delivered pursuant to this Agreement are complete, true and correct and comply with all Standards. Vendor shall provide LGS with a guaranty form executed by an officer of Vendor, if prescribed by Standards, along with Vendor's invoice (before payment is required to be made and without loss of discount). Upon request Vendor shall provide Lowe's with any information necessary to facilitate Lowe's disposal or return to Vendor of any merchandise which is defective, off-specification, mislabeled or which otherwise fails to conform to any LGS Purchase Order.

(6) Vendor warrants and represents that if the importation of products into the United States or Canada or the sale of the products in the United States or Canada is enjoined or otherwise stopped for any reason, then in that event, Vendor shall, at LGS' option and at Vendor's expense, either remove the reason for said injunction or stoppage, or alternatively, substitute other products approved in writing by LGS that are not subject to the injunction or stoppage. If such event occurs (injunction or stoppage of the products), then Vendor shall pay LGS all damages and expenses incurred by LGS and/or LGS' customers due to said injunction or stoppage, which shall include, but

is not limited to the following: lost profits, attorney fees and expenses incurred along with any associated expenses (such as testing fees, engineering consultant fees, etc.) that LGS and/or LGS' customers may expend or incur to insure compliance. LGS at its exclusive option, may back charge or set off any funds due to Vendor in respect to its damages or expenses to overcome any injunction or stoppage of importation of the products.

(7) With acknowledgment that the terms and conditions of this paragraph have been expressly bargained for and are an essential part of this Agreement and all LGS Purchase Orders, and in consideration of any and all purchases heretofore, herein and hereafter made by LGS from Vendor or from affiliates or subsidiaries of Vendor, and by accepting this Agreement or any LGS Purchase Order, Vendor agrees to defend and shall indemnify LGS, its employees, its officers, its directors, its agents, its parent, its subsidiaries, its affiliates, its customers and the successors and assigns of any of the foregoing (hereinafter "Indemnitees") and shall hold them harmless from and against any and all liability and/or losses and/or damages, whether compensatory or punitive, which may be assessed against any of them. Vendor's obligation to indemnify and hold harmless Indemnitees shall include, but not be limited to, any and all claims, lawsuits, appeals, actions, assessments, product recalls, decrees, judgments, orders, investigations, civil penalties or demands of any kind, including court costs, expenses and attorney's fees, which may be made or brought against Indemnitees arising out of: (1) any allegation of or actual misrepresentation or breach of warranty; (2) any alleged bodily injury or property damage related to the possession or use of any product; (3) any alleged infringement of any patent, design, trade name, trademark, copyright or trade secret; (4) any alleged violation by Vendor or any law, ordinance, code, rule, or regulation; (5)

any alleged or threatened discharge, release or escape of pollutants or other environmental impairment; (6) any breach or violation by Vendor of any terms or conditions of this Agreement or any LGS Purchase Order; or (7) any other allegation arising directly or indirectly from any product originating from Vendor. Vendor shall pay all judgments against and assume the defense of Indemnitees upon Indemnitees' demand with respect to any such matters, even if any such allegation of liability is groundless, false or fraudulent. Notwithstanding the above, Indemnitees shall have the right but not the obligation to participate as they deem necessary in the handling, adjustment, defense or settlement of any such matters. Further, for the term of this Agreement and hereafter, Vendor releases Indemnitees from any claim based on Vendor's patent, copyright, trademark, trade dress or other intellectual property rights. LGS, at its sole discretion, shall have the right to purchase from other sources those products manufactured or offered by Vendor free of any patent, copyright, trademark, trade dress or other intellectual property rights of Vendor.

Should Vendor fail to assume its obligations hereunder, to diligently pursue and pay for the defense of Indemnitees within ten (10) days from the written demand by Indemnitees, Vendor hereby agrees that Indemnitees shall have the right, but not the obligation, to proceed on their own behalf to defend themselves by way of engaging their own legal counsel and the services of any and all other experts or professionals they deem necessary to prepare and present a proper defense, and to thereafter require from Vendor reimbursement and indemnification for all costs and expenses incurred in such defense and for any and all penalties, judgments, fines, interest or other expenses incurred as a result of such claim, lawsuit, appeal, action, assessment, civil penalty, product recall, decree judgments, orders or demands as more fully set forth above. Vendor warrants, represents

and agrees that Indemnitees shall have the exclusive right, at their sole option, to settle or otherwise proceed to resolution of any dispute at their discretion. Vendor warrants, represents and agrees that it will reimburse Indemnitees for all payments, costs and expenses paid by or for Indemnitees in respect to said settlement. Indemnitees, at their sole option, may charge back or set off any monies due by Vendor to LGS in respect to the settlement of any claims under this Agreement.

(8) Vendor warrants Vendor is a corporation and/or partnership duly organized, validly existing, and in good standing under the laws of the country of origin of the products; said Vendor has the requisite corporate power and/or authority and the legal right to enter into this Agreement, and to conduct its business as now conducted and hereafter contemplated to be conducted; and is in compliance with its Articles of Incorporation and Bylaws or its Partnership Agreement. Vendor warrants the execution, delivery and performance of this Agreement and all instruments and documents to be delivered by Vendor are within the Vendor's corporate power and/or partnership agreement have been duly authorized by all necessary or proper action, including the consent of shareholders if required; do not and will not contravene any provisions of the Vendor's Articles of Incorporation or Bylaws and/or Partnership Agreement. Vendor warrants this Agreement has been duly executed and delivered by Vendor, and constitutes the legal, valid, and binding obligation of the Vendor and enforceable against the Vendor in accordance with its terms.

(9) Vendor warrants and acknowledges that Vendor and its officers, directors, employees and agents have received a copy of LGS and/or its parent corporation's Code of Ethics and Statement of Business Ethics. Vendor warrants along with its officers, directors, employees

and agents hereby warrant, covenant and agree to perform in strict compliance with the LGS and/or its parent corporation's Code of Ethics, Statement of Business Ethics, and all applicable laws, rules, regulations, orders, codes, and governmental orders.

(10) Vendor warrants that the performance of this Agreement along with any addenda to said Agreement and LGS purchase order(s), is personal to Vendor. Vendor warrants, represents and guarantees that no other entity will manufacture the products or otherwise perform any obligations under this Agreement without the express written approval of a representative of LGS. Vendor further warrants, represents and guarantees that Vendor has not and shall not prior to, during the term of, and/or any time subsequent to the execution of this Agreement or any LGS purchase order(s) has made or will make any payment to any outside parties, representatives, agents, without prior written approval and notification from LGS.

(11) Vendor warrants, represents and guarantees that all communications between the parties concerning this Agreement, any LGS purchase order(s) or the products manufactured pursuant thereto shall be made in English. Vendor acknowledges and warrants that it has completely read this Agreement prior to execution of the Agreement and that Vendor understands and accepts each of the terms contained herein.

(12) Vendor shall indemnify LGS against and hold LGS harmless from any and all lawsuits, claims, actions, damages (including reasonable attorney fees, obligations, liabilities and

liens) arising or imposed in connection with LGS for amounts due and owing under this Agreement where Vendor has not complied with the notice requirements of this section.

(13) Vendor, by entering into this Agreement and by accepting any LGS Purchase Order, warrants, represents and guarantees that all labor used by the Vendor and/or its vendors or suppliers is furnished by employees with a minimum age of no less than 16 years. Vendor acknowledges LGS policy of purchasing products from vendors who do not use child labor in the production of goods.

(14) Vendor, by entering into this Agreement and by accepting any LGS Purchase Order, warrants, represents and guarantees that all labor in producing the goods by the Vendor and/or its vendors or suppliers is not furnished, manufactured, produced, or distributed, wholly or in part by convicts or prisoners, except convicts or prisoners on parole, supervised release, or probation, or in any penal or reformatory institution.

(15) Vendor warrants, covenants and agrees to ship each item on each LGS Purchase Order complete and on the shipment date as set out in the LGS Purchase Order.

(16) Vendor warrants, covenants, acknowledges and agrees that LGS is in the business of procuring products on behalf of certain other entities who sell the products at retail in the United States and Canada, and in the event Vendor fails to comply with any of the terms and conditions of this Agreement, or the LGS Purchase Orders, then in that event, such failure to perform will result

in damage not only to LGS but to LGS' customers. Vendor acknowledges that LGS will be liable to LGS' customers for its failure to perform, and therefore, Vendor warrants, represents and guarantees that Vendor shall indemnify LGS and LGS' customers and hold LGS and LGS' customers harmless for any damages arising or imposed in connection with LGS and/or LGS' customers where Vendor has not complied or failed to perform under the LGS Master Standard Buying Agreement, the LGS Purchase Order and any associated documents provided to Vendor by LGS.

ARTICLE VI. **PRODUCTS RETURNS**

(1) Notice of defects in the products or any other breach by Vendor under the terms of this Agreement and the individual LGS Purchase Order will be considered made within reasonable time, if made within a reasonable time after being discovered by LGS or after notification is given to LGS by LGS' customers or the users of the products. The return of such products shall not relieve Vendor from liability from any failure to ship conforming products under the LGS Purchase Order or for liability with respect to warranties, expressed or implied. Failure of LGS to state a particular defect upon rejection shall not preclude LGS from relying on unstated defects to justify rejection or establish breach. Resale, repackaging, repacking or cutting up for the purpose of resale or for use shall not be considered as acceptance of the products so as to bar LGS right to reject such products or to revoke acceptance.

(2) Vendor agrees that in the absence of a negotiated and signed Defective Products Return Policy, LGS will adhere to the following general guidelines. Specifically, defective products

(item) will be destroyed by the retailer, LGS, and/or LGS's parent without obtaining Vendor return authorization. Vendor further agrees to reimburse LGS and its parent for the products (item) at Purchased Ordered delivered cost, including all freight charges.

ARTICLE VII. **CANCELLATIONS & RETURNS**

(1) LGS reserves the right to refuse or return any products comprising a portion of LGS Purchase Order that is not shipped complete, as ordered and in accordance with the terms in this Agreement and in compliance with all details, including requested ship and arrival dates, as outlined in the LGS Purchase Order.

(2) LGS reserves the right to cancel in whole or in part any Purchase Order up to thirty (30) days prior to the shipment of products on the Purchase Order without incurring any liability.

ARTICLE VIII. **MISCELLANEOUS**

(1) Both parties acknowledge that this LGS' Master Standard Buying Agreement forms the agreement between the parties and controls the manufacture, sale and delivery of products. Performance of any LGS Purchase Order must be in accordance with all of the terms and conditions stated herein. There can be no changes or modifications to the Standard Master Buying

Agreement, unless in writing and signed by an officer of LGS. In absence of any agreements signed by Vendor, this Agreement represents the entire agreement of the parties.

(2) All costs, lost profits and expenses incurred by LGS or LGS' customers due to Vendor's violations of or failure to follow any or all of the terms of this Agreement will be charged back to Vendor and Vendor expressly agrees to reimburse LGS or LGS' customers for all such costs, loss profits and expenses. Vendor further agrees that LGS or LGS' customers may deduct such costs, loss profits and expenses from any sum thereafter owing to Vendor by LGS or LGS' customers under any Orders between LGS or LGS' customers and Vendor.

(3) Any and all taxes, fees, imports or stamps required by State, Federal or Municipal Governments in the exporting of products/products to LGS shall be paid and assumed by Vendor.

(4) No provisions of this Agreement shall be waived or shall be construed to be waived by LGS unless such waiver is in writing and signed by an authorized agent of LGS. No failure on the part of LGS to exercise any of the rights and remedies granted hereunder or to insist upon strict compliance by Vendor shall constitute a waiver of LGS right to demand exact compliance with the terms hereof. The Vendor hereby waives use of the statute of frauds as a defense to any Order accepted pursuant to this Agreement.

(5) The rights, remedies and options provided herein are in addition to and not to the exclusion of any and all other rights and remedies provided by law.

(6) LGS shall not be bound by any assignment of any LGS Purchase Order by Vendor, unless LGS has consented prior thereto in writing. LGS may assign any LGS Purchase Order to a present or future subsidiary, affiliate, or parent.

(7) Should LGS use the services of an attorney to enforce any of its rights hereunder, or to collect any amounts due, Vendor shall pay LGS for all costs and expenses incurred, including reasonable attorney's fees.

(8) This Agreement shall be construed and enforced in accordance with the laws of the State of North Carolina, USA. The parties agree that the courts within the State of North Carolina will have exclusive jurisdiction with venue being in Wilkes County, State of North Carolina, USA. Vendor in executing this Agreement, hereby submits itself to the jurisdiction of the federal and state courts of the State of North Carolina, USA.

(9) Vendor agrees to furnish, when returning this completed Agreement, a complete set of current financial statements. Publicly held companies should include the Annual Report to Shareholders and 10K Report (or any international equivalent document). If financial statements are not available, a Dun & Bradstreet report should be furnished.

(10) The Vendor shall provide LGS written notice of an assignment, factoring or other transfer of its right to receive payments arising under this Agreement 30 days prior to such

assignment, factoring or other transfer taking legal effect. Such written notice shall include the name and address of assignee/transferee, date assignment is to begin, and terms of the assignment and shall be considered delivered upon receipt of such written notice by LGS' Trade Payable Department. Vendor shall be allowed to have only one assignment, factoring or transfer legally effective at any one point in time. No multiple assignments, factoring or transfers by the Vendor shall be permitted. LGS reserves the right to require any and all documentation in reference to the legal effect of the assignment, factoring or other transfer as determined needed by LGS Corporate Counsel prior to accepting the assignment, factoring or other transfer by LGS.

(11) Vendor, by and through its representative, further covenants and agrees not to communicate during the term of this Agreement, or at any time subsequently, any such information relating to the secrets, business methods, business secrets, including trade secrets, business information, or the manner in which LGS conducts its business to any person, corporation or entity. Vendor acknowledges and agrees that Vendor has and will receive confidential information including, but not limited to: Proprietary packaging, proprietary product(s) and/or product design(s), LGS business and confidential data which includes quotations, sales volume, pricing, etc. and that money damages will not adequately compensate LGS for any disclosure of any information in violation of this agreement. Any right of equitable enforcement granted to LGS shall not be deemed to preclude LGS from seeking actual money damages or any other remedy from Vendor and/or its agents in the event of a breach of such covenant.

Confidential information does not include information that is generally known by the public or, which becomes known to Vendor through no breach of the Agreement or other unauthorized use of LGS' confidential information.

(12) At any time during the term of this Agreement and for a period of five (5) years after the final payment of any invoice under this Agreement, LGS, or its designated agent, shall have the right to examine and audit up to five (5) years of the Vendor's records in respect to any and all matters occurring within the five (5) year period prior to the request and relating to LGS payments to Vendor under this Agreement, including, but not limited to, payments for any orders, invoices, and Vendor's compliance with LGS business ethics policies and LGS Code of Ethics. Vendor shall maintain complete and accurate records to substantiate Vendor's charges, pursuant to this Agreement. By execution of this Agreement by Vendor, LGS shall have access to such records for the purpose of audit during normal business hours upon reasonable notice to Vendor.

(13) The initial term of this Agreement is for one (1) year commencing on the date first written above and shall automatically renew on a year-to-year basis thereafter, unless terminated by written notice by either party not later than sixty (60) days prior to the end of the then current term.

(14) Any dispute, controversy or claim arising out of or relating to this Agreement, any Purchase Orders between the parties, or the breach, termination or invalidity thereof may at the sole discretion of LGS be finally settled under the Rules of the American Arbitration Association by one or more arbitrators appointed in accordance with said Rules. The place of arbitration shall be

Charlotte, North Carolina, USA and the law applicable to arbitration procedures shall be laws of the state of North Carolina, USA. The English Language shall be used throughout the arbitral proceedings. The parties agree that the award of the arbitrator(s): shall be the sole and exclusive remedy between them regarding any claims, counterclaims, issues or accountings presented or pled to the arbitrator(s); that it shall be made and shall promptly be payable in U.S. dollars free of any tax, deduction or offset; that any costs and attorneys fees incurred by the prevailing party as determined by the arbitrator(s) incident to the arbitration, shall be included as part of the arbitration award; and that any costs, fees or taxes incident to enforcing the award shall, to the maximum extent permitted by law, be charged against the party resisting such enforcement. The award shall include interest from the date of any damages incurred for breach or other violation of the contract, and from the date of the award until paid in full, at a rate to fixed by the arbitrator(s), but in no event less than the prime interest rate for First Union National Bank in Charlotte, North Carolina, U.S.A.

(15) The representations, warranties, indemnification, obligations and guarantees contained in this Agreement shall survive for the maximum period permitted by the applicable statutes of limitations, if any, except that the warranties and guarantees in Article V of this Agreement shall survive twenty (20) years from the last date of any purchase pursuant to this Agreement by LGS from the Vendor.

*Vendor Name:*_____

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Vendor Name: _____

IN WITNESS WHEREOF, LGS and the undersigned Vendor have hereunto set their hands as of the date of this Agreement.

ATTEST:

L G SOURCING, INC.

BY: Robert Jaime

TITLE: President

_____
Company Chop/Seal

Received and accepted:

ATTEST: (VENDOR)

COLLINS CO., LTD.
Name of Company

BY: Fred Chen
(Signature Line)

FRED CHEN
(Print Signature in English)

EXECUTIVE VICE PRESIDENT
(Full Title of Executing Officer).

_____
Company Chop/Seal

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